Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

C.M.C.,

PETITIONER,

versus

G.A.L. and K.L.,

RESPONDENTS.

On Petition for Writ of Certiorari
to the Colorado Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I.

Whether the Colorado Supreme Court erred when, adding to a longstanding split between the highest courts of different states that only this Court has jurisdiction to resolve, it interpreted the phrase "declined to exercise" jurisdiction "to make . . . a child custody determination" in 28 U.S.C. section 1738A(f)(2) to cover Missouri courts' deciding the merits of a child custody contest according to a substantive standard different from Colorado's "best interests" standard.

II.

Whether the Colorado Supreme Court consequently committed a violation, which only this Court has jurisdiction to correct and deter, of the requirements of 28 U.S.C. section 1738A(a) that "the appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in subsections (f), (g), and (h) of this section, any custody determination . . . made consistently with the provisions of this section by a court of another State."

III.

Whether the Colorado Supreme Court consequently committed also a violation, which only this Court has jurisdiction to correct and deter, of the requirement of 28 U.S.C. section 1738A(g) that "a court of a State shall not exercise jurisdiction in any proceeding for a custody . . . determination commenced during the pendency of a proceeding in a court of another State where such court of that other State is exercising

jurisdiction consistently with the provisions of this section to make a custody . . . determination."

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Court's decision brings to three the number of states in which the highest courts disagree on this issue of interpretation of section 1738A(f)(2), and this Court is the only court with jurisdiction to resolve the split. 9

GROUND II: The Colorado Supreme Court violated the provision of 28 U.S.C. section 1738A(a) that requires the appropriate authorities of every state to "enforce according to its terms" and to not "modify" the custody determination of a sister state when it reversed the Colorado trial court's order enforcing the Missouri order, and when it instructed the Colorado district court to consider on the merits Respondents' request for modification of the Missouri decree. 26

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STATEMENT OF THE BASIS OF JURISDICTION

The Colorado Supreme Court entered its ruling on April 12, 2004. On April 26, 2004, Petitioner filed a timely Petition for Rehearing. The Petition for Rehearing was denied May 3, 2004. Jurisdiction of this Court is invoked under Title 28, United States Code §1257(a) as the issues presented involve the interpretation of Title 28, United States Code §1738A and the rights afforded to the Petitioner under that statute.

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const., Art. IV sec. 1

> Full Faith and Credit shall be given in each State to the Public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

U.S. Const., Art. VI sec. 2

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Title 28, U.S. Code, sec. 1738A(a):

> The appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in (f)(g) and (h) of this section, any custody determination...made consistently with the provisions of this section by a court of another State.

Title 28, U.S. Code, sec. 1738A(b):

As used in this section, the term–

> (2) "contestant" means a person, including a parent or grandparent, who claims a right to custody or visitation of a child;
>
> (3) "custody determination" means a judgment, decree, or other order of a court providing for the custody of a child, and includes permanent and temporary orders, and initial orders and modifications;
>
> (4) "home State" means the State in which, immediately preceding the time involved, the child lived with his parents, a parent, or a person acting as parent, for at least six consecutive months, and in the case of a child less than six months old, the State in which the child lived from birth with any of such persons. Periods of temporary absence of any of such persons are counted as part of the six-month or other period;
>
> (5) "modification" and "modify" refer to a custody or visitation determination which modifies, replaces, supersedes, or otherwise is made subsequent to, a prior custody or visitation determination concerning the same child, whether made by the same court or not;
>
> (6) "person acting as a parent" means a person, other than a parent, who has physical custody of a child and who has either been awarded custody by a court or claims a right to custody;

Title 28, U.S. Code, sec. 1738A(c):

> A child custody or visitation determination made by a court of a State is consistent with the provisions of this section only if--
>
> (1) such court has jurisdiction under the law of such State; and
>
> (2) one of the following conditions is met:
>
> (A) such State (i) is the home State of the child on the date of the commencement of the proceeding, or (ii) had been the child's home State within six months before the date of the commencement of the proceeding and the child is absent from such State because of his removal or retention by a contestant or for other reasons, and a contestant continues to live in such State;
>
> (B) (i) it appears that no other State would have jurisdiction under subparagraph (A), and (ii) it is in the best interest of the child that a court of such State assume jurisdiction because (I) the child and his parents, or the child and at least one contestant, have a significant connection with such State other than mere physical presence in such State, and (II) there is available in such State substantial evidence concerning the child's present or future care, protection, training, and personal relationships;

(C) the child is physically present in such State and (i) the child has been abandoned, or (ii) it is necessary in an emergency to protect the child because the child, a sibling, or parent of the child has been subjected to or threatened with mistreatment or abuse;

D) (i) it appears that no other State would have jurisdiction under subparagraph (A), (B), (C), or (E), or another State has declined to exercise jurisdiction on the ground that the State whose jurisdiction is in issue is the more appropriate forum to determine the custody or visitation of the child, and (ii) it is in the best interest of the child that such court assume jurisdiction; or

(E) the court has continuing jurisdiction pursuant to subsection (d) of this section.

Title 28, U.S. Code, sec. 1738A(d):

The jurisdiction of a court of a State which has made a child custody or visitation determination consistently with the provisions of this section continues as long as the requirement of subsection (c)(1) of this section continues to be met and such State remains the residence of the child or of any contestant.

Title 28, U.S. Code, section 1738A(f):

> [a] court of a State may modify a determination of the custody of the same child made by a court of another State, if (1) it has jurisdiction to make such custody determination; and (2) the court of the other State no longer has jurisdiction, or it has *declined to exercise such jurisdiction to modify such determination.*

Title 28, U.S. Code, sec.1738A(g):

> A court of a State shall not exercise jurisdiction in any proceeding for a custody or visitation determination commenced during the pendency of a proceeding in a court of another State where such court of that other State is exercising jurisdiction consistently with the provisions of this section to make a custody or visitation determination.

STATEMENT OF THE FACTS AND CASE

On April 18, 2003, Petitioner C.M.C ("Mother") gave birth to A.J.C. in St. Louis Missouri. On April 21, 2003, Respondents G.A.L. and K.L. commenced proceedings for adoption and custody of A.J.C. in the Circuit Court of St. Charles County Missouri ("the Missouri trial court"), by filing a Petition for Termination of Parental Rights and Transfer of Legal Custody and Petition for Adoption, and filing Mother's Transfer of Temporary Custody and Appointment of Power of Attorney. See Appendix at 10-11, 80, 102. The Transfer provided that Mother could change her mind prior to the court's acceptance of her consent to termination of parental rights and adoption, and that if she did change her mind, she would reimburse Respondents $20 per day for every day the child had been with them. See ibid.

On April 21, 2003, Mother signed a Consent to Termination of Parental Rights and Consent to Adoption. Pursuant to Mo. Rev. Stat. sec. 453.030(7),(8) (2003), any

consent to termination of parental rights must be approved by the court and may be withdrawn at any time prior to its approval.

On April 21, 2003, the Missouri trial court signed an Order temporarily placing A.J.C. with the Respondents. The Missouri trial court stated that it retained jurisdiction in this matter for a hearing on the Petition for termination, transfer of custody, and adoption. Also filed on April 21st was a document signed by Respondents, entitled Legally at Risk Placement, in which they acknowledged that the placement was "legally at risk"until termination of parental rights. They further agreed that "[i]n the event that termination of parental rights does not occur, then prospective adoptive parents agree to return the child to the intermediary."

On May 15, 2003, the Missouri trial court entered an Order stating that the Consent executed by the birth mother was not approved. See Appendix at 102. At this time, the child was less than a month old. On July 25,

2003, in accordance with Mo. Rev. Stat. sec. 453.030(7) (2003), Mother filed a Motion to Withdraw and Revoke Consent. See id., 102-03. On August 22, 2003, the Missouri trial court entered a Judgment and Order granting Mother's motion to withdraw her consent. See id. at 12. At this time, the child was four months old. Despite their agreement, Respondents did not return the infant child to his mother, but continued to litigate.

In a Response to the Petition for Adoption filed September 10, a Motion to Dismiss filed on September 9, and a Memorandum in Support filed on September 26, 2003, Mother requested that custody of her son be returned to her. See Appendix at 12, 103. On October 15, 2003, the Missouri trial court issued a Judgment of Dismissal of Petition for Adoption and awarded Mother custody of her then-six-month-old child. Appendix at 100. However, Respondents still did not return the child to his Mother.

Instead, on November 3, 2003, Respondents filed

with the Missouri trial court a Motion to Vacate Judgment. A hearing was held on December 5, 2003 and on January 2, 2004, the court denied the Motion to Vacate Judgment. Appendix at 111. The court found that Mother had withdrawn her consent and that despite Respondents' contentions, Mother had not abandoned her child. This finding was based upon the Transfer of Temporary Custody and Appointment of Power of Attorney document she executed, that specifically provided that Mother may change her mind and wish to take back physical custody of her child and further provides that if she does so, she will reimburse Respondents in the amount of $20 for every day the child had been in their care. However, still Respondents did not return the child to his Mother. By this time, January 2004, the child was eight months old.

Respondents filed a Notice of Appeal with the Missouri Court of Appeals Eastern District and filed unsuccessful motions to set Supersedeas Bonds in both

the Missouri trial court and the Missouri Court of Appeals. On March 2, 2004, the Missouri Court of Appeals denied the motion. On March 16, 2004, Respondents dismissed their appeal.

While litigating this matter in Missouri, the Respondents also began to litigate in Colorado. On October 31, 2003, two weeks after the Missouri trial court ordered that physical custody of A.J.C. be returned to his Mother, and four days before the Respondents filed in Missouri the Motion to Vacate the Order awarding Petitioner custody, Respondents filed in the District Court for Jefferson County, Colorado ("the Colorado trial court"), a Verified Petition for Allocation of Parental Responsibilities. On November 3, 2003, the same day that Respondents filed their Motion to Vacate in the Missouri trial court, Mother filed a Petition for Writ of Habeas Corpus in the Colorado trial court, seeking the immediate return of her child. On December 3, 2003, two days before the Missouri trial court held its hearing on

the Motion to Vacate, Mother filed in Colorado an Answer and a Motion to Dismiss the Petition. On December 23, 2003, Respondents filed in the Colorado trial court a request for additional time to respond to the Petition for Writ of Habeas Corpus. On January 3, 2004, just one day after the Respondents had lost again in the Missouri trial court, the Colorado trial court also ruled against them, entered a Writ of Habeas Corpus, and ordered them to immediately return A.J.C. to his Mother. The Colorado trial court dismissed Respondents' Petition, found that the Missouri trial court had previously entered an order awarding Mother custody of her child, and ruled that because Missouri retains continuing and exclusive jurisdiction over the matter, the Colorado trial court does not have jurisdiction. Appendix at 94.

On January 8, 2003, just days after their most recent loss in the Missouri trial court, Respondents filed in the Colorado trial court a Response to the Motion to Dismiss. On January 13, 2003, the Colorado trial court

entered an Order reaffirming its prior rulings, finding that Missouri had original jurisdiction in this matter, denying Respondents' request that it reconsider its granting of the Writ of Habeas Corpus, and dismissing the Verified Petition for Allocation of Parental Rights. Appendix at 97.

Respondents then filed in the Colorado Supreme Court a Petition pursuant to Colorado Appellate Rule 21. On January 20, 2004, the Colorado Supreme Court directed Mother to answer in writing why the relief requested in Respondent's Petition should not be granted. Mother filed a response to the Petition arguing, among other things, that the Missouri court order was entitled to full faith and credit and that the Parental Kidnaping Prevention Act of 1980 (PKPA), 28 U.S.C.A., § 1738A (2003), requires the courts of every state to enforce a child custody determination of a sister state made consistently with the provisions of that Act.

On April 12, 2004, the Colorado Supreme Court

held that while it was obligated to recognize and enforce the order of the Missouri trial court insofar as it dismissed the adoption proceeding, Colorado courts are not obligated to enforce that portion of the Missouri trial court's order that awards custody of the child to his Mother. Appendix at 1. The Colorado Supreme Court held that, because Missouri failed to conduct a best interests analysis in issuing its custody decree, it "declined jurisdiction" to modify that order under section 1738A(f) of the PKPA. The Colorado Supreme Court remanded the matter to the trial court to determine custody based upon the child's "best interests."

On April 26, 2004, Mother filed a Petition for Rehearing arguing that the Colorado Supreme Court's decision is contrary to the mandates of 28 U.S.C. § 1738A and the full faith and credit clause of the United States Constitution. It was denied May 3, 2004. Appendix at 116.

REASONS FOR GRANTING THE WRIT

GROUND I:

The Colorado Supreme Court decided an important federal question under the Parental Kidnaping Prevention Act in a way that conflicts with the decision of another state court of last resort, and erred when it concluded that the provision in 28 U.S.C. section 1738A(f)(2) that allows a court of a State to modify a custody determination made by the court of a different state if "the court of the other State . . . has declined to exercise . . . jurisdiction to modify such determination," permits Colorado to modify the Missouri decree simply because Missouri applied a substantive standard other than "the best interests of the child." The Colorado Supreme Court's decision brings to three the number of states in which the highest courts disagree on this issue of interpretation of section 1738A(f)(2), and this Court is the only court with jurisdiction to resolve the split.

Article IV, section 1 of the United States Constitution provides that

> Full Faith and Credit shall be given in each State to the Public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Despite this constitutional requirement and an

implementing statute enacted in the eighteenth century, 28 U.S.C. sec. 1738 (2003), many state courts did not consider custody decrees sufficiently final to trigger full faith and credit requirements. Thompson v. Thompson, 484 U.S. 174, 179 (1988). See People of the State of New York ex rel. Halvey v. Halvey, 330 U.S. 610, 614-615 (1947); Kovacs v. Brewer, 356 U.S. 604, 607-608 (1958). As those who sponsored and supported the passage of the PKPA were aware,

> [C]urrent law in many States encourages a parent who does not have custody to snatch the child from the parent who does and take the child to another State to relitigate the custody issue in a new forum ...[the PKPA] would impose on States a Federal duty, under enumerated standards derived from the [Uniform Child Custody Jurisdiction Act], to give full faith and credit to the custody decrees of other States.

PARENTAL KIDNAPING PREVENTION ACT OF 1979: JOINT HEARING ON S. 105 BEFORE THE SUBCOMMITTEE ON CHILD AND HUMAN DEVELOPMENT OF THE COMMITTEE ON LABOR

AND HUMAN RESOURCES, 96th Cong. 2d Sess. 48 (1980)[testimony of Acting Deputy Attorney General Michel]. Congress thus passed the Parental Kidnaping Prevention Act of 1980 (PKPA), codified at Title 28, U.S. Code, § 1738A. ("Section 1738A"). Colorado is required to follow the express terms of the PKPA. U.S. CONST., Art. VI, sec. 2.

The PKPA applies to the enforcement or modification of an existing custody decree or when a custody action is already pending in another state. In re Marriage of Murphy, 952 P.2d 624 (Wash.App. Div. 3 1998). Section 1738A(a) requires that the appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in subsections (f), (g),(h), any custody determination made consistently with the provisions of Section 1738A by a court of another state. Section 1738A(d) provides that if a state has made a custody determination, that state's jurisdiction over the matter continues for so long as the

state has jurisdiction under its own law and so long as either the child or one of the contestants continues to reside there. These provisions make exclusive the continuing jurisdiction of the state that duly issued the original decree. See Russell M. Coombs, Child Custody and Visitation By Non-Parents Under the New Uniform Child Custody Jurisdiction and Enforcement Act: A Rerun of Seize and-Run, 16 J. AM. ACAD. MATRIM. LAW. 1, 111-14 (1999) (describing the extent to which the PKPA requires states to respect the exclusive continuing jurisdiction of courts of other states).

The Colorado Supreme Court has clearly transgressed not only the specific terms of the PKPA, but also this Court's directions regarding a state's duties under the PKPA. In Thompson v. Thompson, this Court held that the PKPA

> imposes a duty on the States to enforce a child custody determination entered by a court of a sister State if the determination is consistent with the provisions of the Act. ... [T]he State must have jurisdiction under

> its own local law and one of the five conditions set out in section 1738A(c)(2) must be met. Briefly put, these conditions authorize the state court to enter a custody decree if the child's home is or recently has been in the State, if the child has no home State and it would be in the child's best interest for the State to assume jurisdiction, or if the child is present in the State and has been abandoned or abused [or if the state has continuing jurisdiction under its own laws and either the child or one of the contestants continues to reside in that state]. Once a State exercises jurisdiction consistently with the provisions of the Act, no other State may exercise concurrent jurisdiction over the custody dispute, section 1738A(g), even if it would have been empowered to take jurisdiction in the first instance, and all States must accord full faith and credit to the first State's ensuing custody decree.

484 U.S. 174, 175-76 (1988).

It is undisputed, as the Colorado Supreme Court admits in its opinion, that Missouri state law gave it jurisdiction to enter the custody decree, that its jurisdiction was consistent with §1738A, and that Missouri's jurisdiction therefore continued to the exclusion of Colorado courts unless the Missouri trial

court had, within the meaning of Section 738A(f)(2), declined to exercise such jurisdiction to modify its order. See People ex rel. A.J.C., supra, 88 P.3d at 611-12; Appendix at 51-52 (stating that the Missouri court has continuing jurisdiction and that under the PKPA, Colorado courts may not modify its order unless Missouri has declined such jurisdiction.).

Respondents commenced the action in Missouri by filing a Petition for Adoption that included a prayer for a custody award. The Missouri trial court granted temporary custody of the child to the Respondents and reserved jurisdiction over the child until such time as the adoption was finalized. Ultimately the Missouri trial court dismissed the adoption petition while at the same time entering an order requiring that the child be returned immediately to his mother. Respondents filed a new action in Colorado and at the same time continued to litigate in Missouri, requesting that the Missouri trial court reconsider its rulings regarding both adoption and

custody. During the pendency of the Colorado action, the Missouri trial court continued to exercise jurisdiction by holding a hearing and, after finding that the mother had not abandoned the child and was not unfit, again ordering that the child be returned to his mother.

Because the custody determination made by the Missouri trial court complied with the provisions of 28 U.S.C. sec. 1738A(c), and because the Missouri proceeding was pending at the time the Colorado proceeding was commenced, under sec 1738A(g), Colorado was obligated to refrain from exercising jurisdiction. The provisions of the PKPA prohibit Colorado from modifying the Missouri Court's orders awarding custody of A.J.C. to his mother. Section 1738A(a) states in no uncertain terms:

> The appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in (f)(g) and (h) of this section, any custody determination...made consistently with the provisions of this section by a court of another State.

Subsection (h) prohibits the modification of a prior

visitation decree of another state unless that other State no longer has jurisdiction to modify or has declined to exercise its jurisdiction. Under Subsection (g), a state must refrain from exercising jurisdiction when an action is already pending in a sister state and the sister state meets the jurisdictional pre-requisites set forth in §1738A(c).

The Colorado Supreme Court, while recognizing the applicability of the PKPA, held that Missouri declined to exercise jurisdiction within the meaning of subsection (f)(2) when it applied the substantive law of its own State rather than the substantive law of the State of Colorado, which requires, in custody disputes between parents and non-parents, the application of a best interest analysis. The Colorado Supreme Court concluded that because Missouri had declined to exercise jurisdiction, the Colorado Courts can modify the Missouri decree and determine the custody of A.J.C. without violating section

1738A(a).[1]

Colorado's decision is the third decision of the highest court of a state contributing to an interstate conflict over interpretation of section 1738A(f)(2). The first decision on this issue was E.E.B. v. D.A., 446 A.2d 871 (N.J. 1982), in which the New Jersey Supreme Court interpreted subsection (f)(2) to mean that another state's

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[1]The applicability of the best interest standard in custody disputes between parents and non-parents is constitutionally suspect. In Troxel v. Granville, 530 U.S. 57 (2000), this Court held that a Washington statute that allowed any person the right to petition the court for visitation and allowed the court to order such visitation if it was in the best interest of the child violated the substantive due process rights of the natural mother. In so concluding, this Court stated:

> The liberty interest at issue in this case--the interest of parents in the care, custody, and control of their children--is perhaps the oldest of the fundamental liberty interests recognized by this Court.

See also Lassiter v. Department of Social Services, 452 U.S. 18, 27(1981); Quillon v. Walcott, 434 U.S. 246 (1978); Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816, 842 (1977); Stanley v. Illinois, 405 U.S. 645, 651 (1972), all recognizing the fundamental liberty interest of natural parents in the care and custody of their children.

application of substantive child custody law contrary to New Jersey's "best interests" standard rendered the other state's decision on the merits of custody a "declination of jurisdiction" to decide the case. Eleven years later, the Supreme Court of Michigan adopted an opposite interpretation of subsection (f)(2), that such a decision was an exercise of jurisdiction rather than a declination to exercise it. In re Clausen, 502 N.W.2d 649, 652, stay denied sub nom. Deboer by Darrow v. Deboer, 509 U.S. 1301 (application for stay made to Justice Stevens as Circuit Justice), and 509 U.S. 938 (1993) (application for stay made to Justice Blackmun referred to entire Court). Now, another eleven years later, the Colorado Supreme Court has added to the interstate conflict over this federal issue. See also In re Ieronimakis, 831 P.2d 172, 189-90 (Wash. App. Div. 1 1992) (Kennedy, J., dissenting on other grounds, stating that the Washington court should not have assumed jurisdiction over the child custody dispute, and, citing E.E.B., questioning whether a "decree

which is not based on the best interest of the child is ....a custody determination.")

During these twenty-two years, commentators have published contrasting analyses of this issue. E.g. contrast Herma Hill Kay, Adoption in the Conflict of Laws: The UAA, Not the UCCJA is the Answer, 84 CAL. L. REV. 703, 726-27 (1996) (calling E.E.B. "for several reasons a highly suspect decision," one of those reasons being that application of the PKPA in the case "would dictate that such a proceeding be brought in Ohio, not New Jersey"), with Michael A. Weinberg, Note, DeBoer v. Schmidt: Disregarding the Child's Best Interests in Adoption Proceedings, 23 CAP. U. L. REV. 1099, 1138 (1994) (contending that "the holding of E.E.B. v. D.A. is correct"). See generally Jerry A. Behnke, Note and Comment, Pawns or People? Protecting the Best Interests of Children in Interstate Custody Disputes, 28 LOY. L.A. L. REV. 699, 715-16 (1995) (stating that "there remains a sharp difference of opinion among the courts over . . . the

question of whether the PKPA and UCCJA authorize a state to modify a custody decree of another state if that state did not consider the best interests of the child"). In 1988 this Court held that federal district courts lack jurisdiction to resolve such interstate conflicts, see Thompson v. Thompson, supra, 484 U.S. at 187; thus, only this Court can resolve such a persistent disagreement over interpretation of the PKPA. See Behnke, supra, 28 LOY. L.A. L. REV. at 715-16 (stating that "the Supreme Court is the only judicial body with the authority to resolve this conflict").

The Colorado Supreme Court recognized that the Missouri order was a custody determination. People ex rel. A.J.C., supra, 88 P.3d at 603, Appendix at 17 (referring to the Missouri trial court's order as an "order restoring custody of A.J.C. to Mother"); id., 88 P.3d at 608, Appendix at 37 (referring to the Missouri trial court's order as an "order granting custody to Mother"); id., 88 P.3d at 608, Appendix at 37 (referring to the Missouri

trial court's "custody decree" in this case). The Colorado Supreme Court also acknowledged that the Missouri court's jurisdiction was consistent with the PKPA and continued to the exclusion of Colorado, so that Colorado could exercise jurisdiction "only if Missouri has declined such jurisdiction." Id., 88 P.3d at 612; Appendix at 52. However, the Colorado Supreme Court found that the Missouri Court had declined to exercise jurisdiction because it had failed to conduct a best interest analysis in issuing its custody decree. People ex. rel A.J.C., 88 P.3d at 612, Appendix at 54. Therefore, under the logic of the Colorado Supreme Court, Colorado courts are free to exercise jurisdiction, to deny enforcement of the Missouri custody decree, and to modify that decree.

The Colorado Court's interpretation of the phrase "declined to exercise jurisdiction" is erroneous. The Missouri trial court never declined to exercise jurisdiction. To the contrary, pursuant to substantive Missouri law, the Missouri trial court dismissed the

adoption proceeding, and after finding that the mother did not abandon her child, the court determined, by applying Missouri law to that finding of fact, that Mother was entitled to the physical and legal custody of her child. Missouri law is clear- once an adoption proceeding has been dismissed, Missouri Law requires that the child be returned to the natural mother unless there is a finding that she is not fit to raise the child or has otherwise abandoned him. The Missouri Court exercised jurisdiction by both dismissing the adoption proceeding **and** awarding custody of the child to his mother.

The Colorado Supreme Court ruled that because Missouri did not apply Colorado substantive law, Missouri declined to exercise jurisdiction. Colorado, in resolving a custody dispute between a parent and a non-parent, does not recognize the natural parent's liberty interest in raising her child, but instead applies a "best interest" standard in awarding custody as between the non-parent and the parent; the Colorado Supreme Court

held that, under the PKPA, the Missouri courts declined jurisdiction over this best interests issue.

The Colorado Supreme Court's interpretation of the phrase "declines to exercise jurisdiction" guts the entire purpose behind the PKPA, namely, to discourage those involved in custody disputes from seeking relief from a state whose courts might be more sympathetic to their position or whose substantive laws regarding custody or visitation might work to their favor. The Colorado Supreme Court encourages relitigation of custody issues in a new forum, or, as here, ***simultaneous*** litigation in two different states. In so doing, the Colorado Supreme Court makes a mockery of the PKPA, and the full faith and credit principles that underpin it.

"As the legislative scheme suggests, and as Congress explicitly specified, one of the chief purposes of the PKPA is to 'avoid jurisdictional competition and

conflict between State courts.'" Thompson v. Thompson, supra, 484 U.S. at 177.

The Colorado Supreme Court's interpretation that substantive standards relating to custody should be employed in determining jurisdiction under the PKPA results in a return to the situation prior to the passage of the PKPA. It is an open invitation for parties in custody disputes to once again engage in forum shopping. It encourages jurisdictional disputes. In rejecting such a result, and declining to follow the New Jersey example relied upon by the Colorado Supreme Court here, the Michigan Supreme Court stated in In re Clausen:

> We reject the rationale of E.E.B. v. D.A., to the extent that it is cited for the proposition that an order transferring custody pursuant to a judgment determining custody is modifiable per se on a best-interests analysis. . . . [T]his proposition . . . if accepted, would mean that an order granting custody would be enforceable only if the losing party voluntarily complied. Such a construction would invite the losing party to resist transfer, in order to have the court issue an enforcement order, which would form the basis for an opportunity to relitigate best interests. Such a result would introduce a degree of instability into this

> jurisprudence antithetical to the best interests of all parties.

502 N.W.2d 649,675 n. 31 (Mich. 1993). This scenario is exactly what happened here: The proper forum for Respondents to pursue their request for custody was with the Missouri courts, either as a request for visitation in the Missouri trial court or as an appeal in the Missouri Court of Appeals. Rather than pursuing this course of action, the Respondents dismissed their Missouri appeal and proceeded to do precisely what the PKPA was intended to prevent -- they found a new forum in which to litigate their custody dispute. The Colorado Supreme Court, rather than discouraging this behavior and enforcing federal law, rewarded the Respondents by refusing to enforce the Missouri decree.

This Court should grant this petition for writ of certiorari to make it abundantly clear that questions of substantive law and jurisdiction must be kept separate when determining jurisdiction under the PKPA, thereby

ensuring that the law's purpose is served by discouraging forum shopping and requiring enforcement of the custody orders of sister states regardless of whether or not the state that is asked to modify the existing decree agrees with it or with the substantive law of the sister state.

GROUND II:

The Colorado Supreme Court violated the provision of 28 U.S.C. section 1738A(a) that requires the appropriate authorities of every state to "enforce according to its terms" and to not "modify" the custody determination of a sister state when it reversed the Colorado trial court's order enforcing the Missouri order, and when it instructed the Colorado district court to consider on the merits Respondents' request for modification of the Missouri decree.

Because Missouri did not decline to exercise jurisdiction within the meaning of section 1738A(f), and because, as the Colorado Supreme Court acknowledged, only such a declination would have relieved Colorado courts of the obligations in section 1738A(a), the Colorado Supreme Court's misinterpretation of section 1738A(f) led

it to violate section 1738A(a), both by failing to enforce the Missouri custody determination, and by instructing the Colorado trial court to modify it.

GROUND III:

The Colorado Supreme Court violated 28 U.S.C. section 1738A(g), which prohibits a state from exercising jurisdiction in a proceeding commenced during the pendency of a proceeding in another state that is exercising jurisdiction consistent with section 1738A, when it instructed the Colorado trial court to exercise jurisdiction to decide the merits of this custody dispute.

Under Section 1738A(g), a court must refrain from exercising jurisdiction in any proceeding commenced during the pendency of a proceeding in a court of another State where such court of that other State is exercising jurisdiction consistently with the provisions of the PKPA to make a custody or visitation determination. The Missouri proceeding was commenced on April 18, 2003; it was continuing at the time that Respondents commenced the Colorado proceeding on October 31, 2003; and it

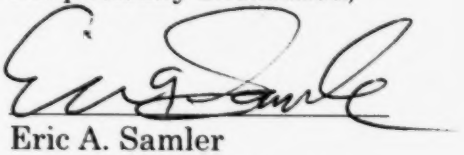
continued until March 2004, when Respondents dismissed their Missouri appeal. Thus, the Colorado Supreme Court violated section 1738A(g) when it instructed the Colorado trial court to decide on remand the merits of this custody dispute.

The Colorado Supreme Court acknowledges that the Missouri court's exercise of jurisdiction was consistent with the PKPA. See People ex rel. A.J.C., supra, 88 P.3d at 611-12; Appendix at 51-52. The only purported reason offered by the Colorado Supreme Court for avoiding application of Section 1738A(g) is its conclusion that the Missouri trial court declined to exercise jurisdiction. This conclusion of the Colorado Supreme Court was erroneous, as explained above in this Petition.

CONCLUSION

Petitioner respectfully requests that this Court issue a Writ of Certiorari to the Colorado Supreme Court and vacate its Order and Judgment. Further, Petitioner requests that this Court stay implementation of the Order and Judgment of the Colorado Supreme Court during the pendency of this petition for a Writ of Certiorari.

Respectfully submitted,



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Supreme Court, U.S.
FILED
AUG 2 - 2004
OFFICE OF THE CLERK

No. 04 184

IN THE

SUPREME COURT OF THE UNITED STATES

C.M.C.,

PETITIONER,

versus

G.A.L. and K.L.,

RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE COLORADO SUPREME COURT

APPENDIX, volume 1

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SUPREME COURT, STATE OF COLORADO
Two East 14th Avenue
Denver, Colorado 80203

Case No. 04 SA 18

ORIGINAL PROCEEDING PURSUANT TO
C.A.R. 21
JEFFERSON COUNTY DISTRICT COURT,
CASE 03DR2893

In re:

THE PEOPLE OF THE STATE OF COLORADO,

In the interest of:

Minor Child :

A. J. C.:

DOB: 04/18/03

Petitioners:

G. A. L. and V. K. L.,

and concerning :

Respondents:

C.M.C. and D. C.

RULE MADE ABSOLUTE
EN BANC

April 12, 2004

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JUSTICE KOURLIS delivered the Opinion of the Court.
JUSTICE COATS dissents

I. INTRODUCTION

This is an original proceeding under C.A.R. 21 in which the Petitioners, G.A.L. and V.K.L., seek review of an order of the Jefferson County District Court (the district court) dismissing their Verified Petition for Allocation of Parental Responsibilities, Writ of Habeas Corpus, and subsequent Order denying the Petitioners post-judgment relief.

Specifically, the Petitioners ask this court to reverse those orders and remand the matter back to the district court for an evidentiary hearing on their Verified Petition for Allocation of Parental Responsibilities. We issued a Rule to Show Cause on January 20, 2004, and ordered expedited briefing.

This case involves a failed adoption. The child, A.J.C., was born in Missouri on April 18, 2003. Immediately after his birth, the natural mother consented to the placement of the child for adoption with a Colorado couple, the Petitioners, who returned here with him and have remained here. In October of 2003, the Missouri court dismissed the adoption petition filed by the Petitioners in Missouri because the natural mother had, by that time, withdrawn her consent. The Missouri court eventually ordered that the Petitioners return the child to the mother. The Petitioners commenced a

proceeding in Colorado seeking to establish an ongoing relationship with the child, even though that child was no longer available for adoption.

Had the child been born in Colorado, our statutes and case law would direct the courts of this state to entertain the Petitioner's Petition for Allocation of Parental Responsibilities, despite the failed adoption. That custody determination, like all custody determinations, would be guided by the best interests of the child and a court would take evidence to that effect.

What we consider here is whether, because the child was born in Missouri, spent two days of his life there and was the subject of a Missouri adoption proceeding, the outcome should be a different one. To resolve that question, we look not only to Colorado's and Missouri's internal law, but also to the laws that govern interstate disputes of this

nature. Although we uncover more questions than answers in our survey of this body of law, we ultimately conclude that there is nothing about the interstate nature of this dispute that would demand that Colorado decline to treat this child as we would treat a child born within our borders.

We organize our analysis in this opinion by first outlining Colorado's internal law, then summarizing the law in Missouri that would appear to apply. Colorado law would clearly direct the court to engage in a "best interests" analysis concerning the placement of A.J.C. Nothing in Missouri law controverts the undertaking of that inquiry, and indeed, Missouri courts themselves have undertaken similar inquiries in other cases.

We then look to the laws in both Colorado and Missouri that bear upon the resolution of interstate disputes of this nature. Colorado previously

determined its jurisdiction in interstate custody disputes by reference to the Uniform Child Custody Jurisdiction Act (UCCJA), section 14-13-101, et seq., 5 C.R.S. (1999), which is no longer in place in Colorado, but which is still in place in Missouri. Mo. Rev. Stat. 452.440 to 452.550 (2003). When it was in place, courts of this state construed the UCCJA to apply to custody issues arising out of failed adoptions, and Missouri's courts seem to concur. Hence, if we look to any continuing applicability of the UCCJA by virtue of its force in Missouri, Colorado would be entitled to exercise jurisdiction over this dispute as the home state of the child because the child has resided here for all of his young life.

However, Colorado has repealed the UCCJA, and enacted the more modern Uniform Child-custody Jurisdiction and Enforcement Act (UCCJEA). § 14-

13-101, et seq., 5 C.R.S. (2003). We conclude that the UCCJEA does not apply to failed adoption proceedings, by specific language of the statute. Hence, the UCCJEA offers us little assistance in this controversy. We do note that the exclusion of adoptions from the UCCJEA was made in reliance upon an expectation that states will adopt the Uniform Adoption Act (UAA). Unif. Adoption Act, 9 U.L.A. 16, 16-132 (1994). Although neither Colorado nor Missouri have enacted the UAA, the drafters of the UCCJEA believed the UAA was an important and appropriate outline of law governing adoptions. Thus, we review its terms and conclude that it, too, would direct Colorado to proceed with a best interests inquiry concerning this child.

Both Colorado and Missouri have adopted the Interstate Compact on the Placement of Children (ICPC or the "Compact"). §§ 24-60-1801 to 24-60-

1803, 7B C.R.S. (2003); Mo. Ann. Stat. § 210.620 (2003). Under that Compact, the sending agency in Missouri is empowered to cause the return of the child to that state. By virtue of Missouri law, we construe the sending agency to mean the adoption intermediary here, who has declined to request that the child be returned to Missouri.

Accordingly, reviewing all potentially applicable laws, we find nothing that would mandate that Colorado decline to engage in the inquiry that it would afford to a Colorado-born child: namely – assessing the Petitioners' and the natural mother's claims in the context of the child's own best interests. We conclude that the district court erred in determining that it was without jurisdiction to hear the Petitioners' case.

Our decision today comports with the

"an object that 'belongs' to a parent or would-be parent and has to be shifted back and forth in the event 'ownership' rights are changed or reinstated." Unif. Adoption Act (1994) § 2-408, cmt., 9 U.L.A. 62 (1999). Rather, A.J.C. is a party to this proceeding and, as such, has the right to have his best interests heard and determined by the court, independent of the legal rights of either his biological mother or the Petitioners. We now make the Rule absolute and remand the case to the district court for further proceedings consistent with this opinion.

II. FACTS AND PROCEDURAL HISTORY

This case concerns a child, A.J.C., who was born in Missouri on April 18, 2003, to C.M.C. (Mother) and D.C. (Father).[1] On April 19, 2003,

[1] The facts cited herein are taken from the briefs and supporting documents submitted by the parties. The records from earlier proceedings in the Missouri circuit court are not before us.

Appointment of Power of Attorney for Care of Child. This agreement transferred the physical and temporary legal custody of A.J.C. from Mother to the Petitioners pending a final adoption. The Petitioners are both residents of Colorado.

On April 21, 2003, Mother signed a Consent to Termination of Parental Rights and Consent to Adoption, which was filed with the Circuit Court of St. Charles County, Missouri (the "circuit court"). That same day, the Petitioners filed both a Petition for Termination of Parental Rights and Transfer of Legal Custody and a Petition for Adoption in the circuit court. Additionally, the Petitioners filed a Motion for an Emergency Order for Transfer of Custody. On April 21, 2003, the circuit court entered an Order approving preliminary placement of A.J.C. with the prospective adoptive

parents, the Petitioners. The circuit court noted in that Order that it was approving preliminary placement only and that it retained jurisdiction to conduct a formal hearing regarding the termination of Mother's parental rights, the transfer of legal custody of A.J.C. to the Petitioners, and ultimate approval of the Petition for Adoption. At that point, two days after the baby's birth, the Petitioners obtained physical custody of A.J.C. and returned with him to Colorado.[2]

On May 15, 2003, the circuit court entered an Order stating that it could not approve the Consent to Termination of Parental Rights and Consent to Adoption because "[s]aid consent did not identify the

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[2] We note that we have no record of a guardian ad litem advocating on behalf of A.J.C.'s interests in the adoption proceedings, although Missouri law requires the appointment of such a person. Pursuant to Mo. Rev. Stat. § 453.025 (2003), a court "shall, in all cases where the person sought to be adopted is under eighteen years of age, appoint a guardian ad litem . . . to represent the person sought to be adopted."

name of any possible father of the child," as required by Missouri law. After this Order was entered, Mother apparently changed her mind about the adoption and on July 25, 2003, Mother filed a Motion to Withdraw and Revoke Consent to Adoption with the circuit court. On August 22, 2003, the circuit court entered a Judgment and Order granting Mother's motion withdrawing her consent to the termination of her parental rights and consent to the adoption.

On September 26, 2003, Mother filed a Motion to Dismiss the Petitioners' Petition for Adoption. Mother asserted that she had effectively withdrawn her consent to the adoption, thereby terminating the adoption proceedings. As a result, Mother argued that custody of A.J.C. should revert to her.

On October 15, 2003, some six months after Petitioners had obtained custody of A.J.C., the

circuit court entered a Judgment of Dismissal of the Petitioners' Petition of Adoption. The circuit court noted that Mother had withdrawn her consent to the termination of her parental rights and consent to the adoption before such consent was reviewed and approved by the court.[3] Furthermore, the circuit court found that no circumstances existed that would allow the adoption to proceed without consent.[4] Thus, the circuit court granted Mother's Motion to Dismiss and ordered that physical custody of A.J.C. be restored to Mother forthwith.

On November 3, 2003, the Petitioners filed a Motion to Vacate the circuit court's Judgment of Dismissal of Petition of Adoption entered on October 15, 2003. On December 5, 2003, the circuit court

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[3] Mo. Rev. Stat. § 453.030.7 (2003) provides that written consent to adoption "may be withdrawn anytime until it has been reviewed and accepted by a judge."

[4] Mo. Rev. Stat. § 453.040 (2003) enumerates certain circumstances where the consent of biological parents to the adoption of a child is not required.

held a hearing on the Petitioners' Motion to Vacate.[5] On January 2, 2004, the circuit court denied the Petitioners' Motion to Vacate. The circuit court determined that, as a matter of law, Mother effectively withdrew her consent to the termination of her parental rights and to the adoption of A.J.C. by the Petitioners. Furthermore, the circuit court concluded that Mother had not abandoned A.J.C.[6] The circuit court held that "[t]he consequence of that determination is that the child shall be returned to Mother's Custody." However, the circuit court specifically noted that it was not determining custody as between Mother and Father, noting that such a determination "must necessarily await

[5] A transcript of that proceeding is not before this court.
[6] The Petitioners alleged that Mother had abandoned A.J.C. A finding of abandonment would have obviated the need for valid consent to the adoption by Mother and Father pursuant to Mo. Rev. Stat. § 453.040.7.

another proceeding."[7]

On October 31, 2003, two weeks after the circuit court ordered that physical custody of A.J.C. be returned to Mother, and four days before the Petitioners filed their Motion to Vacate the Circuit Court Order awarding custody to Mother, Petitioners

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[7] At the present time, there is an appeal pending in the Missouri Court of Appeals. This appeal involves the dismissal of the Petitioner's Petition for Adoption. Specifically, the appeal addresses whether Mother's withdrawal of her consent to the adoption was valid. However, this appeal does not change the focus of our analysis. To the contrary, this appeal supports the notion that the failed adoption proceedings, to which we are according full faith and credit, are separate and distinct from the issue we address today, namely whether Colorado has jurisdiction to determine who should have custody of A.J.C. Stated differently, this is not a case where the Petitioners seek to re-litigate in Colorado the unfavorable result reached in the Missouri adoption proceedings. Rather, the Petitioners seek an independent custody determination that reflects the best interests of A.J.C. For a discussion of the differences between adoption proceedings and custody proceedings, see Herma H. Kay, Adoption in the Conflict of Laws: The UAA, Not the UCCJA, is the Answer, 84 Cal.L.Rev. 703, 728 (1996) (Unlike a custody determination that "commits the court to a supervision of the parent-child relationship" until the child "attains majority or becomes emancipated," adoption proceedings "sever the parental ties created by birth" and "replace them with legal ties that will serve as the foundation for a new parent-child relationship.").

filed a Verified Petition for Allocation of Parental Responsibilities with the district court in Colorado. On November 3, 2003, Mother filed a Petition for Writ of Habeas Corpus with the district court in Colorado. One month later, on December 3, 2003, Mother filed an Answer to the Petitioners' Petition as well as a Motion to Dismiss the Petition.

On January 3, 2004, the district court entered a Writ of Habeas Corpus commanding the Petitioners to return the custody of A.J.C. to Mother. That same day, the district court entered an Order dismissing the Petitioners' Verified Petition for Allocation of Parental Responsibilities. The district court found that an initial custody determination regarding A.J.C. had been made by the circuit court in Missouri. As a result, the district court determined that it lacked jurisdiction to entertain

the Petitioners' Petition.[8]

On January 8, 2004, the Petitioners filed a Motion for Post-Trial Relief in the district court. The district court denied that motion in an Order dated January 13, 2004.[9] The Petitioners filed a Petition for Rule to Show Cause pursuant to C.A.R. 21 with

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[8] It should be noted that the district court did not decide, as a matter of judicial discretion, to decline jurisdiction over the Petitioners' Petition. Rather, the district court determined that, as a matter of law, it lacked jurisdiction. During a January 16, 2004, hearing, District Court Judge Stephen Munsinger stated:

> "I'd like nothing better than to have the child remain here in Colorado, and have jurisdiction over the child, but my understanding of the procedure is that Missouri has primary jurisdiction . . . . If I had jurisdiction I'd be the first one to exercise it . . . ."

[9] In his Order, Judge Stephen Munsinger referenced a December 4, 2003, telephone conference between himself and Judge Briscoe, the Missouri circuit court Judge. The court has a transcript of that conference as part of the record in this proceeding. In essence, the conversation between Judges Munsinger and Briscoe consisted of a discussion about the proceedings in Missouri and a conclusion by Judge Munsinger that Judge Briscoe's Order dismissing the Petitioners' Petition for Adoption divested the district court in Colorado of any jurisdiction over the custody of A.J.C.

this court on January 20, 2004.[10] We issued a Rule to Show Cause and now make that Rule absolute.

III. OVERVIEW OF ANALYSIS

The issue before us in this original proceeding is whether the district court had jurisdiction to consider the Petitioners' Verified Petition for Allocation of Parental Responsibilities. Despite the procedural complexity of the case, the ultimate issue is quite simple and quite compelling. Specifically, we must determine whether a court in Colorado has jurisdiction to consider placement of a child when that child has lived in Colorado with prospective adoptive parents in excess of six months and has been determined by another state to be no longer available for adoption.

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[10] The issue presented for review is "whether or not the Jefferson County District Court erred in dismissing Petitioners' Verified Petition for Allocation of Parental Responsibilities and granting the Writ of Habeas Corpus."

It is undisputed that the circuit court's order dismissing the Petition for Adoption is entitled to full faith and credit. Indeed, the Petitioners do not seek to re-litigate those adoption proceedings in Colorado. However, the Petitioners do maintain that they have the right to seek custody of A.J.C. notwithstanding the failed adoption in Missouri. Hence, we must determine whether the circuit court's order restoring custody of A.J.C. to Mother as a result of the failed adoption divests Colorado of jurisdiction to determine who should have custody of A.J.C. based on his best interests. To answer this question, we review the internal law in Colorado and Missouri and the applicable laws in both states addressing jurisdiction in interstate disputes of this nature.

IV. INTERNAL LAW

A. Colorado Law

Initially, we note that had the failed adoption proceedings taken place exclusively in Colorado, there would be no question that the district court would have jurisdiction to entertain the Petitioners' Verified Petition for Allocation of Parental Responsibilities.

In 1995, this court held that non-parents with physical custody of a child in contemplation of future relinquishment and adoption proceedings had standing under the Uniform Dissolution of Marriage Act (UDMA), section 14-10-101, et seq., 5 C.R.S. (2003), to seek custody of the child after the adoption failed. In re Custody of C.C.R.S., 892 P.2d 246, 253 (Colo. 1995) (non-parents who had physical possession and control of a child for six months before the filing of their custody petition had

standing under either subsection (1)(b) or (1)(c) of section 14-10-123, 5 C.R.S. (2003) of the UDMA. Most importantly, for purposes of the case before us today, we also held that the revocation of a biological parent's consent to the termination of parental responsibilities and adoption did not give the biological parent an automatic statutory right to the return of her child. C.C.R.S., 892 P.2d at 254. Rather, we determined that "the prospective adoption proceedings turned into a custodial dispute under the UDMA, which did not involve the termination of parental rights." Id.

Additionally, Colorado's statutes governing adoptions provide that when the relinquishment of a parent-child legal relationship is revoked, "the court shall dismiss any proceeding for adoption and shall provide for the care and custody of the child

according to the child's best interests."[11] § 19-5-104(8), 6 C.R.S. (2003) (emphasis added).

Hence, in Colorado, by operation of statute and case law, when prospective adoptive parents have custody of a child and the adoption fails, those individuals nonetheless have a right to ask a court to determine whether they may be afforded some ongoing rights and responsibilities in service of the best interests of the child. Those proceedings would, under present law, be governed by the UDMA and, accordingly, the "best interests of the child standard" would apply at that point. C.C.R.S., 892 P.2d at 257-58.

This failed adoption proceeding occurred in Missouri, not Colorado. Therefore, it falls to us to determine whether the interstate nature of this case

[11] Although the revocation of a relinquishment of parental rights is not the precise factual circumstance we face to today, this statutory provision is certainly instructive and persuasive as to the legislature's intent.

causes us to change the result reached in C.C.R.S.

B. Missouri Law

Missouri, like Colorado, has recognized that in certain situations, a failed adoption does not automatically result in the custody of a child being restored to the natural parent(s). See In re Baby Girl, 850 S.W.2d 64 (Mo. 1993) (where trial court considered the validity of a biological mother's consent to adoption, but failed to inquire into the best interests of the child, as required by statute, the case was remanded for further proceedings). Although Baby Girl was based on a specific statute requiring a court to inquire into the best interests of the child when a child is unlawfully removed from the state, we take from that case the principle that failed adoption proceedings do not in all cases require custody to be returned to the biological parent(s).

Indeed, Missouri, like Colorado, emphasizes that the overarching goal in all adoption and custody proceedings is the best interests of the child. See Mo. Rev. Stat. § 453.005 (2003) (The statutory provisions governing adoption and foster care "shall be construed so as to promote the best interests and welfare of the child in recognition of the entitlement of the child to a permanent and stable home."); Mo. Rev. Stat. § 452.375.2 (2003) ("The court shall determine custody in accordance with the best interests of the child."); Shepler v. Sayres, 372 S.W.2d 87, 90-91 (Mo. 1963) (When adjudicating child custody questions, "it may be said that the prime consideration of the courts, and the ultimately determinative factor in all such cases, is that of the welfare and best interests of the children involved."); In re K.K.M., 647 S.W.2d 886, 892 (Mo. Ct. App. 1983) ("The polestar guiding the resolution of

custody disputes is the best interests of the child."); see also In re Neusche, 398 S.W.2d 453, 457 (Mo. Ct. App. 1966) (holding that "the welfare of the child is the primary and paramount consideration in an adoption or custody proceeding, the wishes of the nature [sic] mother and of the petitioners being secondary and subservient thereto").

Missouri law also requires the court to appoint a guardian ad litem to represent a minor child such as A.J.C. who is the subject of an adoption proceeding, presumably in order to convey to the court what the best interests of the child are. Mo. Rev. Stat. § 453.025 (2003) (A court "shall, in all cases where the person sought to be adopted is under eighteen years of age, appoint a guardian ad litem . . . to represent the person sought to be adopted."). Thus, we conclude that Missouri's law, like Colorado's, supports the proposition that custody

determinations, even after a failed adoption, must take into account the best interests of the child.

V. Applicable Interstate Laws

Because interstate child custody decrees are a fact of modern life, various state and national laws have been passed that address enforcement of those decrees. State legislatures around the country have adopted, with some variation, the Uniform Child Custody Jurisdiction Act (UCCJA), see, e.g., Mo. Rev. Stat. §§ 452.440 through 452.550, and its successor, the Uniform Child-custody Jurisdiction and Enforcement Act (UCCJEA), which appears in the Colorado statutes at section 14-13-101, et seq., 5 C.R.S. (2003).

Prior to 2000, Colorado relied upon the UCCJA to determine whether a court of this state had jurisdiction to enter an initial custody order or to modify a pre-existing custody order entered by

another state. However, during the 2000 legislative session, our General Assembly repealed the UCCJA and enacted the UCCJEA, which significantly altered the jurisdictional requirements in interstate custody disputes. Ch. 320, secs. 1-2, § 14-13-101, et seq., 2000 Colo. Sess. Laws 1519, 1519-37. Missouri continues to operate under the old framework of the UCCJA, and has not adopted the UCCJEA. See Mo. Rev. Stat. §§ 452.440-550 (2003).

The United States Congress has recognized the national importance of interstate child placement issues by adoption of the Parental Kidnapping Prevention Act of 1980 (PKPA), § 8, 28 U.S.C.A., § 1738A (2003), which requires the courts of every state to enforce a child custody determination of a sister state made consistently with the provisions of that Act.

Lastly, all fifty states, including Missouri and

Colorado, have adopted the Interstate Compact on the Placement of Children (ICPC). See 2 Am. Jur. 2d Adoption § 28 (2003). The ICPC appears in the Colorado statutes at sections 24-60-1801 through 24-60-1803, 7B C.R.S. (2003).

A. The UCCJA and UCCJEA

Missouri relies upon the UCCJA; Colorado upon the UCCJEA. The UCCJA, when it was in place in Colorado, was held to apply to failed adoptions. Missouri case law appears to accord with that conclusion. The UCCJEA, on the other hand, does not apply to adoption proceedings. In light of the significant differences between the UCCJA and the UCCJEA, we examine each in turn.

i. Jurisdiction Under the UCCJA

The UCCJA is jurisdictional legislation that was developed by the National Conference of Commissioners on Uniform State Laws (NCCUSL) in

1968, and was adopted in Colorado in 1973, nearly verbatim. L.G v. People, 890 P.2d 647, 655 (Colo. 1995).

The UCCJA applies to "custody determinations" made in "custody proceedings." See § 14-13-103(2) and (3), 6B C.R.S. (1999); L.G., 890 P.2d at 657. Although the term "adoption" does not appear in the UCCJA's definition of child-custody determinations or child-custody proceedings, courts of this state construed the UCCJA to include adoption proceedings. See In re Custody of K.R., 897 P.2d 896, 899-900 (Colo. App. 1995) (Adoption proceedings are "custody proceedings" within the meaning of the UCCJA, and therefore its jurisdictional prerequisites apply to custody determinations following a failed adoption.).[12]

[12] Although courts in other jurisdictions have similarly concluded that the UCCJA applies to adoption proceedings, this conclusion is by no means unanimous. See In re Adoption of Asente, 734 N.E.2d 1224, 1231

Missouri appears to be among the states that would similarly apply the UCCJA to adoption proceedings. See In re T.C.M., 651 S.W.2d 525, 528 (Mo. Ct. App. 1983) (Assuming the UCCJA applied to adoptions, Missouri, as the home state of the child, could take jurisdiction over a proceeding in which the prospective adoptive parents resided in Missouri, although the contested adoption proceeding had occurred in North Carolina.).[13]

(Ohio 2000) (recognizing that there is disagreement as to whether the UCCJA should apply to adoption proceedings); see also Johnson v. Capps, 415 N.E.2d 108, 110 (Ind. Ct. App. 1981) (Adoption proceedings are brought for the purpose of terminating all parental rights of the biological mother, not to establish or modify a custody decree, and therefore adoption proceedings are not governed by the UCCJA.); see also Herma H. Kay, Adoption in the Conflict of Laws: The UAA, Not the UCCJA, is the Answer, 84 Cal.L.Rev. 703 (1996) (arguing against the applicability of the UCCJA to adoption proceedings).

[13] In In re Baby Girl, the Missouri court of appeals held that the UCCJA did not apply to an adoption proceeding. 1992 WL 139363 *6 (Mo. Ct. App. 1992) (not published by virtue of transfer to the Missouri Supreme Court). The Supreme Court reversed on other grounds. See In re Baby Girl 850 S.W.2d 64 (Mo. 1993).

Under the UCCJA, courts of this state employed a two-part test to determine whether jurisdiction in a custody matter is proper. L.G., 890 P.2d at 656 (citing Barden v. Blau, 712 P.2d 481, 484 (Colo. 1986)). First, a court was required to determine whether, as a threshold matter, it could properly exercise jurisdiction over a case pursuant to section 14-13-104 of the UCCJA. L.G., 890 P.2d at 656. If the statute conferred jurisdiction, the court was nevertheless required to determine whether, under other provisions of the UCCJA, the court ought to exercise that jurisdiction. Id.

Section 14-13-104(1)(a)-(c), 5 C.R.S. (2003) of the UCCJA provided three general bases for an assertion of jurisdiction over custody proceedings: (1) if the state was the child's home state,[14] and one

[14] Section 14-13-103(5), 5 C.R.S. (1999), defined "home state" as "the state in which the child immediately preceding the time involved lived with his parents, a parent, or a person acting as parent, for at least six

parent or person acting as a parent continued to live in the state even though the child did not; (2) if the child had significant connections with the state so that it was in the child's best interests for that state to assume jurisdiction; and (3) if there was an emergent situation requiring the protection of the child and the child was physically present in the state. L.G., 890 P.2d at 658. Section 14-13-104(1)(d) provided one final avenue for a court to assume jurisdiction. Under that provision, Colorado could assume jurisdiction over the custody proceedings if it appeared that no other state would have jurisdiction under any of the other provisions contained in section 14-13-104. Id.

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consecutive months, and in the case of a child less than six months old the state in which the child lived from birth with any of the persons mentioned." See also § 14-13-104(1)(a), 5 C.R.S. (1999) ("A court of this state . . . has jurisdiction to make a child custody determination by initial or modification decree if . . . [t]his state is the home state of the child at the time of commencement of the proceeding.")

Although the UCCJA identified several different bases for jurisdiction, it provided no clear means of assigning priority among them. Rather, it allowed courts to exercise jurisdiction if any of the jurisdictional requirements within the UCCJA were met. This resulted in the possibility, and indeed the likelihood, that more than one state could assert jurisdiction. See Kathleen A. Hogan, Custody Jurisdiction, 26-WTR Fam. Advoc. 22, 23 (2004). For precisely this reason, after a court determined it had jurisdiction, it was required to take the additional step of determining whether it ought to exercise that jurisdiction in light of other provisions of the UCCJA.

Most importantly, if a court in this state wanted to modify another state's initial custody decree, it was required to satisfy section 14-13-115, 5 C.R.S. (1999), of the UCCJA. That provision

provided that

> [i]f a court of another state has made a custody decree, a court of this state shall not modify that decree unless it appears to the court of this state that the court which rendered the decree does not now have jurisdiction . . . or has declined to assume jurisdiction to modify the decree and the court of this state has jurisdiction.

Thus, once an initial custody decree was entered in another state, the courts of this state could only exercise jurisdiction if the other court lacked jurisdiction when the decree was entered or somehow declined to exercise jurisdiction.

In this case, were we to apply the UCCJA, Colorado would clearly have jurisdiction to entertain the Petitioners' Verified Petition for Allocation of Parental Responsibilities. At the point at which the Petition was filed, A.J.C. had lived in Colorado for at

least six consecutive months. Therefore, Colorado is the home state of A.J.C. under the UCCJA. Additionally, the Petitioners fall within the statutory definition of persons "acting as a parent" because they have had physical custody of A.J.C. since his birth and have exercised all parental rights and responsibilities. However, our conclusion that Colorado is the home state of A.J.C., by itself, would be insufficient to confer jurisdiction upon Colorado under the UCCJA. Rather, we would also be required to consider whether Colorado, in light of other provisions of the UCCJA, should exercise jurisdiction in this case.

Viewing Missouri's order as akin to an initial custody decree, we would be bound under the UCCJA to examine the provisions of section 14-13-115 to determine whether we had jurisdiction to modify that decree. The relevant inquiry for

purposes of this case would be whether Missouri had declined to exercise its jurisdiction by virtue of having failed to determine custody of A.J.C. according to his best interests.

Other jurisdictions relying upon the UCCJA have examined that precise dilemma. Some courts have recognized the need to accord full faith and credit to custody decrees of other states. Others have concluded that the failure to make custody determinations according to the best interests of the child may be construed as a declination of jurisdiction, thereby enabling the state where the child resides to exercise jurisdiction.

The two lead cases around the country on opposing sides of this issue are a New Jersey Supreme Court case and a Michigan Supreme Court case. In E.E.B. v. D.A., 446 A.2d 871 (N.J. 1982), cert. denied, 459 U.S. 1210 (1983), the New Jersey

Supreme Court held that New Jersey was not obligated under either the Parental Kidnapping Prevention Act of 1980 (PKPA), § 28 U.S.C. 1738A (2004), or the UCCJEA to enforce a custody determination made by another state following a failed adoption where the other state did not consider the best interests of the child.

In E.E.B., both the adoptive parents and the natural mother resided in Ohio at the time mother surrendered the child to the state and adoption had been effectuated by the Ohio courts. 446 A.2d at 873. Shortly after the adoption, the mother revoked her consent. Id. To regain custody of the child, she initiated a habeas corpus action in the Ohio courts, ultimately appealing to the Ohio Supreme Court. Id. at 874. The Ohio Supreme Court concluded that the natural mother had effectively revoked her consent and it determined that the right to custody belonged

with the natural mother and, without conducting a best interests hearing, ordered the return of the child to her. Id. at 873-74. During the appeals process, however, the adoptive parents had moved with the child to New Jersey. Id. at 874. The parents then instituted an action for custody in the courts of New Jersey. Id. at 874.

In approving a New Jersey court's exercise of jurisdiction over the case despite the prior custody determination made in Ohio, the New Jersey Supreme Court held that:

> Ohio's failure to conduct a best interest hearing constitutes a refusal to exercise jurisdiction under 28 U.S.C.A. § 1738A(f)(2). Under PKPA, therefore, New Jersey is free to modify the Ohio decree. This result comports with the congressional intent that child custody decisions be made in the state best able to determine the best interest of the child. See Pub.L.No. 96-611, section 7, 94 State. 3568.

Id. at 877. Ultimately, the court held that by declining to determine the best interests of the child, Ohio enabled the New Jersey courts to modify the initial custody determination from Ohio without violating the full faith and credit clause or federal and state statutes, including the UCCJA. Id. at 880.

The Supreme Court of Appeals of West Virginia reached a similar result in Lemley v. Barr, 343 S.E.2d 101 (W. Va. 1986). In that case, adoption proceedings that were initiated in Ohio were invalidated. The natural mother then brought a habeas corpus action in West Virginia to secure custody of the child from the prospective adoptive parents living with the child in West Virginia. The West Virginia court held that the judgment from Ohio setting aside the adoption was entitled to full faith and credit. Id. at 105. Nevertheless, the court

held that West Virginia retained jurisdiction to determine custody in light of the child's best interests. Id.; see also In re Baby Girl L., 51 P.3d 544 (Okla. 2002) (rejecting due process claim of out-of-state prospective adoptive parents seeking custody of child but ultimately holding that Oklahoma statutes required court to determine best interests of child after a failed adoption).

The Supreme Court of Michigan held otherwise when confronted with this issue. In re Baby Girl Clausen, 502 N.W.2d 649 (Mich. 1993); but see id. at 668 (Levin, J., dissenting).[15] In that case, the court rejected the argument that the judgment of an Iowa court should not be enforced based on the

[15] In DeBoer v. DeBoer, 509 U.S. 938 (1993), the United States Supreme Court denied an application to stay the decision of the Supreme Court of Michigan in In re Clausen. Justices Blackmun and O'Connor dissented, recognizing the fundamental disagreement among various courts dealing with the issue of interstate custody disputes following failed adoptions. 509 U.S. at 938.

fact that it did not conduct a hearing concerning the best interests of the child in making a custody determination after a failed adoption. Id. at 660. The court determined that the UCCJA does not require, as a substantive test, that each jurisdiction apply a best interests of the child standard when making custody determinations. Id. at 661. Rather, the court concluded that "[e]ach state, through legislation and interpretive decisions of its courts, is free to fashion its own substantive law of family relationships within constitutional limitations." Id.

As we stated earlier, the UCCJA embodies the notion that custody decrees entered in one state are entitled to full faith and credit in Colorado. However, because the circuit court failed to determine the best interests of A.J.C., we conclude that Colorado would not be obligated under the UCCJA to give full faith and credit to the circuit

court's order granting custody to Mother. In Department of Social Services v. District Court, 742 P.2d 339 (Colo. 1987), this court concluded that two children who had been found dependent and neglected in Ohio and who were in Colorado in a social services placement had to be returned to Ohio upon the request of the Ohio Department of Social Services, the sending agency. The majority focused on the authority of the sending agency to require return of the children, and did not address a best interests analysis. However, Justices Mullarkey and Rovira specially concurred; citing to E.E.B., they would have permitted Colorado to retain jurisdiction under the UCCJA for purposes of conducting a "best interests" hearing. 742 P.2d at 342-43.

Thus, under the UCCJA - the prevailing law in Missouri -- we conclude that Colorado could properly exercise jurisdiction over the Petitioners'

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Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

C.M.C.,

PETITIONER,

versus

G.A.L. and K.L.,

RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE COLORADO SUPREME COURT

APPENDIX, volume 2

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ii. Jurisdiction Under the UCCJEA

We come now to the modern version of the UCCJA -- the UCCJEA. In 1997, the NCCUSL unanimously endorsed the UCCJEA. Patricia M. Hoff, The ABC's of the UCCJEA: Interstate Child-Custody Practice Under the New Act, 32 Fam.L.Q. 267, 267 (1998). As we mentioned above, our legislature adopted the UCCJEA in 2000, thereby replacing the UCCJA. The UCCJEA was formulated to clarify ambiguities and reconcile conflicting interpretations regarding circumstances under which a state has jurisdiction to make or modify custody orders. Hogan, 26-WTR Fam. Advoc. at 24-25. Colorado's UCCJEA provides clearer standards to guide states in exercising or not exercising original jurisdiction over child custody

determinations. It also, for the first time, enunciates the standard for continuing jurisdiction and clarifies modification jurisdiction.

The prefatory note adopted by our legislature and accompanying the UCCJEA provides a useful tool for fleshing out the differences between it and its predecessor, the UCCJA. The prefatory note to the legislation implementing the UCCJEA in Colorado indicates that the drafters of the UCCJEA sought to revise the law on child custody jurisdiction in light of federal enactments and almost thirty years of inconsistent case law. Uniform Child Custody Jurisdiction Prefatory Note, Art. 14, 5 C.R.S. (2003) ("Prefatory Note").

The drafters of the UCCJEA summarized the revisions made to the UCCJA in the Prefatory Note. We likewise summarize those revisions as follows: (1) unlike the UCCJA, the UCCJEA prioritizes

"home state" jurisdiction; (2) the UCCJEA clarifies the parameters for exercising emergency jurisdiction; (3) unlike the UCCJA which failed to clearly enunciate that the decree granting State retained exclusive continuing jurisdiction to modify a decree, the UCCJEA provides for exclusive continuing jurisdiction for the state entering the initial custody decree; (4) the UCCJEA provides greater specificity as to what custody proceedings are covered within its ambit; (5) the UCCJEA eliminates the term "best interests" in order to clearly distinguish between the jurisdictional standards and the substantive standards relating to custody and visitation of children; and (6) the UCCJEA provides for other miscellaneous changes to the UCCJA.

The most important and ultimately dispositive provision of the UCCJEA for our purposes is the one

that provides that the UCCJEA "does not govern an adoption proceeding." § 14-13-103, 5 C.R.S. (2003). The Prefatory Note acknowledges that the definition of custody proceedings under the UCCJA was ambiguous. Prefatory Note at § 4. To clarify this ambiguity and to harmonize conflicting decisions around the country, the UCCJEA "includes a sweeping definition that, with the exception of adoption, includes virtually all cases that can involve custody of or visitation with a child as a 'custody determination.'" Id. (emphasis added).[16]

While the UCCJEA's exclusion of adoptions clarifies the ambiguities created under the UCCJA, this exclusion also creates an obvious gap in the

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[16] The conundrum here is that if we view Missouri as having addressed the custody issue at all, it was only as a part of having recognized that the adoption failed. Hence, the order was a part of an adoption proceeding and the UCCJEA does not apply. If, on the other hand, we view the adoption and custody proceedings as separate proceedings, then Missouri has entered no custody order and Colorado would have initial original jurisdiction.

jurisdictional legislation governing interstate adoptions. See Hoff, 32 Fam.L.Q. at 276-77 ("Because the [Uniform Adoption Act] has not yet been widely adopted, the exclusion of adoption cases from the UCCJEA creates a void in state jurisdictional rules applicable in interstate adoption cases. To avoid the confusion this can be expected to cause, states can either add adoption to the list of covered 'custody proceedings' in [the] UCCJEA . . ., or enact the jurisdictional provisions of the [Uniform Adoption Act] as part of the UCCJEA."). To fill this void, the drafters of the UCCJEA intended that state legislatures also adopt the Uniform Adoption Act (UAA). Specifically, the drafters stated that:

> Two proceedings are governed by other acts. Adoption cases are excluded from this Act because adoption is a specialized area which is thoroughly covered by the Uniform Adoption Act (UAA)

> (1994). Most states will either adopt that Act or will adopt the jurisdictional provisions of that Act. Therefore the jurisdictional provisions governing adoption proceeding [sic] are generally found elsewhere.

Unif. Child Custody Jur. & Enf. Act § 103, cmt., 9 U.L.A. 660-61 (1999).

Section 3-704 of the UAA covers the circumstance we address today as follows:

> If a court denies a petition for adoption, it shall dismiss the proceeding and issue an appropriate order for the legal and physical custody of the minor. If the reason for denial is that a consent or relinquishment is revoked or set aside pursuant to Section 2-408 or 2-409, the court shall determine the minor's custody according to the criteria stated in those sections. If the petition for adoption is denied for any other reason, the court shall determine the minor's custody according to the best interest of the minor.

Unif. Adoption Act (1994) § 3-704, 9 U.L.A. 95-96 (1999) (emphasis added).

Because this case involves Mother's revocation of her consent to the adoption, the provisions of section 2-408 of the UAA would apply. The comments to that provision state in pertinent part:

> This section and Section 2-409 deal with circumstances under which a consent or relinquishment is revoked or may be set aside. Revocation of a consent to a direct placement may occur, without judicial action, under two circumstances. First, a birth parent who executes consent before the minor is 192 hours old can decide to revoke within those 192 hours . . . . This right to revoke is absolute and requires the prospective adoptive parents or their attorney to return the infant to the parent if the infant had been placed with them . . . . Second is when the parent and the prospective adopter mutually agree to revoke the

consent and not proceed with the proposed adoption.

Any other effort to set aside a consent requires judicial action. Until a decree of adoption is issued, a consent will be set aside if the parent proves by clear and convincing evidence that it was obtained by fraud or duress . . . . A finding of fraud or duress is tantamount to a finding that a valid consent never existed and therefore the parent has never agreed to the adoption of the child and the would-be adoptive parents have no basis for retaining custody of the child. The adoption proceedings must come to an end.

Actions to set aside consents for other reasons have less certain outcomes. Even if a parent establishes by a preponderance of the evidence that one or more of the contingencies specified in the consent has occurred -- for example, the other parent's rights have not been terminated -- it does not automatically follow that the parent is entitled to the legal or physical custody of the minor. The Act provides that the court has to take into

account the minor's circumstances at the time consent is set aside. Even though an adoption proceeding may have to be dismissed, the court has to make an order for the minor's care and custody. In making this order, this court must consider not only the status of the birth parent but also the needs and interests of the minor. It is therefore possible under some circumstances for the individuals who sought to adopt the minor to end up with custody of the minor. Much will depend on the relationship between the minor's birth parents, the length of time the minor has been out of their custody, whether independent grounds exist for terminating the rights of either birth parent, the recommendation of the minor's guardian ad litem [appointed in any contested proceeding, Section 3-201], the willingness of the would-be adopters to retain custody even if an adoption is not granted.

Most importantly, the Act does not treat a minor as an object that "belongs" to a parent or would-be parent and has to

> be shifted back and forth in the event "ownership" rights are changed or reinstated. The fact that a birth parent's status as a legal parent may be restored or recognized upon the setting aside of a consent or relinquishment is not tantamount to a determination that the minor must be placed in that parent's custody.

Unif. Adoption Act (1994) § 2-408, 9 U.L.A. 61-62 (1999) (emphasis added).

Thus, the UAA contemplates that when an adoption fails after the child has been with the prospective adoptive parents for some period of time, the court must take into account the best interests of the child in making determinations about continuing placement.[17] The UAA's approach to custody

[17] Section 3-101, the jurisdictional provision of the UAA, mirrors to a large extent the provisions of the UCCJA (not the UCCJEA). Unif. Adoption Act, art. 1, pt. 1, cmt., 9 U.L.A. 66-67 (1999). We observe that it would not direct a different outcome than that which we reach today in balancing the competing interests of Missouri and Colorado.

determinations following a failed adoption is consistent with Colorado's statutory provisions and case law. See § 19-5-104(8), 6 C.R.S. (2003); C.C.R.S., 892 P.2d at 254.

Our General Assembly has adopted the UCCJEA, but not the UAA. The drafters of the UCCJEA intended that the exclusion of adoptions be addressed by enactment of the UAA, which in turn would provide that Colorado should exercise jurisdiction over this dispute in order to determine the best interests of the child.

In summary then, Missouri still follows the UCCJA, which would allow Colorado to exercise jurisdiction if we were to determine, like New Jersey, that the failure to examine the best interests of A.J.C. amounted to a declination of jurisdiction. Colorado has the UCCJEA, which does not apply to adoptions; however, it excludes these proceedings in

reliance upon the expectation that state legislatures will enact the Uniform Adoption Act in its stead. The UAA would direct Colorado to exercise jurisdiction over the Verified Petition for the purpose of reviewing the best interests of A.J.C.

B. The PKPA and ICPC

Within this web of applicable law, we must also recognize and analyze the PKPA and the ICPC.

We conclude that the Parental Kidnapping Prevention Act of 1980 (PKPA or the "Act"), § 28 U.S.C.A. 1738A (2004), does not change the outcome of this case. That Act "imposes a duty on the States to enforce a child custody determination entered by a court of a sister State if the determination is consistent with the provisions of the Act." Thompson v. Thompson, 484 U.S. 174, 175-76 (1988); § 28 U.S.C.A. 1738A(a). Under the PKPA, and by virtue of full faith and credit, "[o]nce a State exercises

jurisdiction consistently with the provisions of the Act, no other State may exercise concurrent jurisdiction over the custody dispute, § 1738A(g), even if it would have been empowered to take jurisdiction in the first instance." Thompson, 484 U.S. at 177.

When it enacted the PKPA, Congress meant to address the problem of conflicting state custody determinations resulting from the legal vacuum created by inconsistent versions of the UCCJA adopted by the various states; the Act affirmatively implemented full faith and credit requirements applicable to all custody determinations. Id. at 181. Importantly, "[t]he sponsors and supporters of the Act continually indicated that the purpose of the PKPA was to provide nationwide enforcement of custody orders made in accordance with the terms of the UCCJA." Id.

The PKPA does not specifically exclude adoptions. Our courts have previously construed the term "custody determination" under the UCCJA, K.R., 897 P.2d at 900, to include adoption proceedings, as other courts have. See, e.g., E.E.B., 446 A.2d at 876. Thus, for purposes of this opinion, we assume that the PKPA applies to this case.

Accordingly, because another state has already entered a custody determination concerning this child, we inquire not whether we may exercise jurisdiction under the PKPA but whether the first-in time court's exercise of jurisdiction was in accordance with the PKPA and whether that jurisdiction continues. In re Marriage of Zierenberg, 16 Cal.Rptr.2d 238, 241 (Cal. Ct. App. 1992). The PKPA provides that "every State shall enforce according to its terms, and shall not modify except as provided in subsections (f), (g), and (h) of this

section, any custody determination . . . made consistently with the provisions of this section by a court of another state." § 1738A(a). The Act states that a custody determination of another state is made consistently with the PKPA as long as (1) the court of the other state has jurisdiction under the law of that state, § 1738A(c)(1), and (2) at least of one of several listed conditions is met.[18]

As pertinent here, one of those conditions is whether the court in the other state has "continuing jurisdiction" under subsection (d) of the statute. Subsection (d) provides that continuing jurisdiction is to be found wherever the court has jurisdiction

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[18] Broadly stated, those conditions are: (a) the state is the child's home state; (b) no other state would have jurisdiction and it is in the best interests of the child for the state to exercise jurisdiction; (c) the child is physically present in the state and has been abandoned or jurisdiction is necessary because of the threat of mistreatment; (d) no other state would have jurisdiction under (a),(b), or (c); or (e) the court has continuing jurisdiction. § 28 U.S.C.A. 1738A(c)(2) (2004).

under the law of that state and either the child or any person claiming custody to the child remains in that state. § 1738A(d); § 1738A(b)(2). Under this definition, then, the Missouri court has continuing jurisdiction related to the custody order in this case.

Accordingly, under the PKPA, we may not modify that order unless one of the Act's exceptions is satisfied. Subsection (f) of the Act provides that "[a] court of a State may modify a determination of the custody of the same child made by a court of another State, if (1) it has jurisdiction to make such custody determination; and (2) the court of the other State no longer has jurisdiction, or it has declined to exercise such jurisdiction to modify such determination." (emphasis added). Because, as we noted above, Missouri has continuing jurisdiction under the Act, the exception would permit us to exercise our jurisdiction only if Missouri has declined

such jurisdiction.

As the U.S. Supreme Court importantly noted in Thompson, custody orders tend to be in conflict among the states because of "the fact that custody orders characteristically are subject to modification as required by the best interests of the child [and a]s a consequence, some courts doubted whether custody orders were sufficiently 'final' to trigger full faith and credit requirements." Thompson, 484 U.S. at 180. Thus, "[b]ecause courts entering custody orders generally retain the power to modify them, courts in other States were no less entitled to change the terms of custody according to their own views of the child's best interest." Id. Because the right to modify remains with the state entering the first custody by virtue of the best interests of the child, some courts, such as the New Jersey Supreme court in E.E.B., have held that where a state court enters

a custody decree without making a determination of the best interests of the child, it specifically declines its jurisdiction to modify that order. 446 A.2d at 877.

Because that interpretation seems to accord with the purpose of the PKPA, as enunciated by the U.S. Supreme Court, we similarly apply the analysis of E.E.B. here. Consequently, we determine that because Missouri failed to conduct a best interests analysis in issuing its custody decree, it declined jurisdiction to modify that order under section 1738A(f). Thus, we conclude that our exercise of jurisdiction in this case is consistent with the terms of the PKPA.

We are left, then, with the ICPC. The ICPC is an interstate compact, which is in place in both Colorado and Missouri. §§ 24-60-1801 - 1803, 7B C.R.S. (2003); Mo. Ann. Stat. § 210.620 (2003). Unlike the UCCJEA, it specifically applies to

adoptions. Article V of the ICPC contains the jurisdictional mandate. It states in pertinent part that:

> The sending agency shall retain jurisdiction over the child sufficient to determine all matters in relation to the custody, supervision, care, treatment and disposition of the child which it would have had if the child had remained in the sending agency's state, until the child is adopted . . . . Such jurisdiction shall also include the power to effect or cause the return of the child or its transfer to another location and custody pursuant to law.

§ 24-60-1802, art. V(a), 7B C.R.S. (2003). Article II of the Compact defines a "sending agency" as "a party state, officer or employee thereof; a subdivision of a party state, or officer or employee thereof; a court of a party state; a person, corporation, association, charitable agency, or other entity which sends, brings, or causes to be sent or brought any

child to another party state." § 24-60-1802, art. II(b). Mother argues that because the adoption failed, Missouri, as the sending agency, retains jurisdiction over the custody of A.J.C.

First, under Missouri law, the sending agency was not the state of Missouri but rather a person, Laura Sipes. See In re Baby Girl, 850 S.W.2d 64, 69 n.6 (Mo. 1993). Sipes was an intermediary who was designated to assist with the placement of A.J.C. The State Compact Administrator in Missouri identified her as the sending agency by way of a signed document entitled "Interstate Compact Placement Request." As such, Ms. Sipes retained jurisdiction over the child to determine all matters until the child was adopted, became self-supporting or was discharged with the concurrence of the appropriate authority in the receiving state. Such

jurisdiction includes the power to effect or cause the return of the child or his transfer to another location. See § 24-60-1802, art. II(c).

Accordingly, if the sending agency demands that the child be returned to the state where the proceeding began, such determination is entitled to be honored under the ICPC. Both Colorado and Missouri would support such an outcome. See Dep't of Soc. Servs. v. Dist. Court, 742 P.2d at 341-42; see also Baby Girl, 850 S.W. 2d at 69-70.

The problem here, however, is that Sipes has sought no such outcome. Rather, in Sipes' affidavit[19] filed with this court, she specifically states that she does not request the return of A.J.C. Rather, she expresses that it is in the best interests of A.J.C. to

[19] Mother sought to strike the Sipes' affidavit because it was not filed with the trial court. We deny that motion and accept the facts as alleged in the affidavit before this court, but recognize that the trial court may revisit the question of Sipes' position on remand if there is any contrary evidence.

remain in Colorado.

This is more than a mere technicality. It highlights a deficiency in the Missouri proceeding which in turn amplifies the dilemma we face here. The sending agency, in the form of Ms. Sipes, was responsible for sending or causing the child to be sent to Colorado. The court order effectuated that transfer, but the court was not itself responsible for the child as was Ms. Sipes. Ms. Sipes has an ongoing responsibility, by operation of the ICPC and she is not requesting that the child be returned to Missouri. Under its own law, Missouri was initially required to appoint a guardian ad litem for A.J.C. because he was under the age of 18 at the time the adoption was filed. Mo. Rev. Stat. § 453.025 (2003). That GAL would have undertaken the responsibility of conveying to the court in Missouri what A.J.C.'s best interests might be. Based upon the record

before us, we have no evidence that such message was conveyed, or inquiry undertaken.

We have already noted that Missouri, like Colorado, recognizes that in certain situations, a failed adoption does not automatically result in the custody of a child being restored to the natural parent(s). See Baby Girl, 850 S.W. 2d at 69-70. Accordingly, we view Missouri as a state, akin to Colorado, that authorizes, if not requires, an inquiry into the best interests of the child even following a failed adoption. Perhaps because of the absence of a GAL, or perhaps because Ms. Sipes has not requested such an inquiry, it has not occurred. No report or testimony has been offered that would result in the Missouri court making a determination about the ongoing best interests of A.J.C. in light of the failed adoption.

For all of those reasons, we do not view the

ICPC as commanding that Colorado decline jurisdiction over the best interests inquiry, when internal law in Colorado, internal law in Missouri, the UCCJA, and the UAA would all support if not mandate that we proceed.

VI. Conclusion

We conclude that Colorado courts may exercise jurisdiction for purposes of determining custody of the child based upon his best interests. We do not believe our exercise of jurisdiction fundamentally contradicts or ignores the respect we have for our sister state of Missouri. Accordingly, we make our Rule to Show Cause absolute, reverse the district court's order dismissing the Petitioners' Petition and remand this matter for further proceedings consistent with this opinion.

JUSTICE COATS dissents.

JUSTICE COATS, dissenting:

Today, the majority directs the courts of

Colorado to ignore the command of a sister state to return an unadopted baby, born on its soil and placed for adoption according to its laws; and instead to decide for themselves whether the child would be better off in the custody of Colorado residents than in the custody of the child's natural parents in the state of its birth. Following a dizzying discussion of jurisdictional statutes, ultimately failing to resolve their individual applicability, the majority concludes that jurisdiction to determine the fate of the child in this case hinges on the choice of the Missouri attorney for the prospective adoptive parents, acting as an "intermediary" in the adoption process, rather than the courts of her state.

Whatever my reservations about an adoption scheme that permits a natural parent's unilateral withdrawal of consent to adoption months after placement of the child, such laws involve policy choices belonging to another branch of government

and, in this case, to another jurisdiction altogether. In any event, I am much more concerned about the jurisdictional free-for-all that will surely result from the majority's approach and the harm done to children who will be forced to suffer under conflicting custody orders and perpetual jurisdictional disputes. Because I cannot endorse the liberties I believe the majority has taken with the jurisdictional choices of both the Colorado General Assembly and the United States Congress, I respectfully dissent.

Almost a decade ago, following a divided intermediate appellate court ruling, see In re Custody of C.C.R.S., 872 P.2d 1337, 1345-55 (Colo. App. 1993) (Taubman, J., dissenting), a bare majority of this court held that the custody provisions of Colorado's dissolution of marriage act also apply to adoptions unrelated to divorce, permitting the courts of this state to allocate the

custody and care of children to prospective adoptive parents, without the consent of the otherwise fit, natural parents or the relinquishment of their parental rights. See In re custody of C.C.R.S., 892 P.2d 246 (Colo. 1995); see also id. at 259 (Lohr, J., joined by Kirshbaum and Scott, JJ., dissenting); id. at 262 (Scott, J., joined by Kirshbaum, J., dissenting). Whatever the merits of that decision, the general assembly's failure to countermand it in the intervening nine years has left it unchallenged as the controlling law of this jurisdiction.

In its opinion today, a majority of the court seeks to extend that judicial power to interstate placements. It does so by again postulating a distinction between the right of prospective adoptive parents to adopt a child and a separate and independent right for them to be granted legal custody of the child. Because even the majority

concedes that its obligations under the Full Faith and Credit Clause require its deference to Missouri's order denying the adoption, it purports only to permit the Colorado District Court to award the care and custody of the child to Colorado non-parents, without actually permitting adoption of the child or termination of the parental rights of the Missouri parents. As tenuous as the C.C.R.S. rationale may have been in the intrastate context, this court at least had the power to construe Colorado's divorce and adoption statutes in pari materia and discover a controlling legislative intent to locate custody in a third party, despite retention by the natural parents of their parental rights. As the majority's strenuous attempt to extend it makes clear, this distinction between custody and adoptability is simply untenable as a device for acquiring jurisdiction in the context of interstate adoptions.

The applicability of the Full Faith and Credit Clause to the interstate enforcement of child custody orders has long presented vexing problems. See In re Baby Girl Clausen, 502 N.W. 2d 649, 661 (Mich. 1993). In 1968, the National Conference of Commissioners on Uniform State Laws drafted the Uniform Child Custody Jurisdiction Act (UCCJA), which was subsequently adopted in some form by all 50 states and the District of Columbia. See L.G. v. People, 890 P.2d 647, 655 (Colo. 1995). A dozen years later, in 1980, Congress responded to the disparate interpretations of the uniform act and continuing disputes over the enforceability of other states' custody decisions by adopting the Parental Kidnapping Prevention Act (PKPA).[20] The federal PKPA imposed a duty on all states to enforce the custody determinations of other states that are

[20] Pub.L. No. 96-611, §2, 94, Pub. Stat. 3566 (1980).

consistent with the PKPA itself. 28 USC §1738A(a)(2004). In part, however, because the PKPA incorporated state UCCJA law, including its overlapping jurisdictional provisions and its highly ambiguous definition of "custody proceedings," deference to sister state custody orders remained inconsistent. Compare In re Clausen with E.E.B. v. D.A., 446 A.2d 871 (N.J. 1982).

Almost 30 years after promulgating the UCCJA, the National Conference therefore revisited the law of child custody jurisdiction, and in an attempt to "eliminate the inconsistent state interpretations and harmonize the UCCJA with the PKPA," replaced the UCCJA with the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). Uniform Child Custody Jurisdiction Prefatory Note, part 1, article 13, title 14, Colorado Revised Statutes (2004). Since its promulgation in

1997, the UCCJEA has been adopted in more than 30 states, including Colorado. See Ch. 320, sec. 1, § 14-13-101 - 403, 2000 Colo. Sess. Laws 1519.

Key among the expressed purposes of the UCCJEA were its clarification of the standards for exercising original jurisdiction over a child custody determination; its enunciation of a standard of continuing jurisdiction; and its clarification of modification jurisdiction. See Uniform Child Custody Jurisdiction Prefatory Note. The accompanying notes to the new, rewritten act also made clear that "the 'best interest' language of the jurisdictional sections of the UCCJA was not intended to be an invitation to address the merits of the custody dispute in the jurisdictional determination or otherwise provide that 'best interest' considerations should override jurisdictional determinations or provide an additional

jurisdictional basis." Prefatory Note 5. In order "to clearly distinguish between the jurisdictional standards and the substantive standards relating to custody and visitation of children," the UCCJEA therefore completely eliminated the term "best interests" from its provisions. Id.

While the majority's "best-interest" jurisdictional analysis was at least colorable under the UCCJA, under the UCCJEA it has therefore been completely foreclosed. Unlike the UCCJA, the UCCJEA makes an express distinction between initial and continuing jurisdiction; gives priority of initial jurisdiction to the "home state;" and provides for exclusive, continuing jurisdiction (until the occurrence of specified events) in any state making a child-custody determination. Id. Because the jurisdictional provisions of the UCCJEA were crafted specifically to preclude simultaneous claims of

jurisdiction by more than one state, it is clear under its provisions that a single jurisdiction has priority of jurisdiction. See § 14-13-201.

Although the UCCJEA also provides for the state with priority of jurisdiction to decline to exercise it, in effect creating jurisdiction in another state, it does so only under specific, statutorily defined circumstances. Apart from the misconduct of a party, which may require the state with jurisdiction to decline it, see § 14-13-208, jurisdiction may be declined only for the reason that the court with jurisdiction determines that it would be an inconvenient forum under the circumstances of the case and that another state would be a more appropriate forum. See § 14-13-207. Significantly, under the scheme of the UCCJEA, jurisdiction may be declined only by the state with priority of jurisdiction and, apart from misconduct by a party, it

may do so only by consciously and expressly determining that another state is the more appropriate forum. Id. As distinguished from E.E.B.'s construction of the UCCJA and PKPA, revived here by the majority, the UCCJEA simply does not allow for a determination by a state seeking jurisdiction that another state with priority of jurisdiction has declined to exercise it by omitting to take some action, whether or not that action would have been required by its own law.

The majority, however, largely ignores the UCCJEA, relying on Missouri's failure to adopt it and Colorado's failure to adopt the Uniform Adoption Act (UAA) to suggest that the UCCJEA is either invalid or inapplicable to this situation. The UCCJEA is not an interstate compact, with applicability only to transactions involving co-signing states, but a jurisdictional statute, expressly

defining the limits of this state's jurisdiction over child-custody determinations. See generally Bernadette W. Hartfield, The Role of the Interstate Compact on the Placement of Children in Interstate Adoption, 68 Neb. L. Rev. 292, 295 (1999)(distinguishing interstate compacts from uniform laws). The fact that Missouri continues to abide by a statute that has been expressly repealed by the Colorado legislature has no bearing on the jurisdiction of the Colorado courts. See § 14-13-301("A court of this state shall recognize and enforce a child-custody determination of a court of another state if the other court exercised jurisdiction in substantial conformity with this article or the determination was made under factual circumstances meeting the jurisdictional standards of this article."); Hector G. v. Josefina P., 771 N.Y.S.2d 316, 324 (N.Y. 2003)("Unlike its

predecessor statute, the UCCJEA was made applicable not only to other states but also to all foreign countries, even if the other jurisdictions have not themselves adopted it."); see also In re Marriage of Zierenberg, 16 Cal. Rptr.2d 238 (Cal. Ct. App. 1992).

Similarly, the UCCJEA clearly expresses no intent that states adopting it will also adopt the UAA, nor is it in any way incomplete or lacking in continuity except in conjunction with the UAA. As its comments indicate, the UCCJEA does not govern adoption proceedings because it contemplates that the jurisdictional provisions governing such proceedings will generally be found elsewhere; "[h]owever there are likely to be a number of instances where it will be necessary to apply this Act in an adoption proceeding." See § 14-13-103 (Official Comment). Along with all but one jurisdiction in the

country, neither Colorado nor Missouri has adopted the UAA. See Unif. Adoption Act of 1994 Jurisdictions Wherein Act Has Been Adopted, 9 U.L.A. 11 (2003)(citing the state of Vermont as the only state that has adopted the Act).

Even if the UCCJA governed this dispute, however, for a host of reasons it would not permit the courts of this jurisdiction to determine the custody of the Missouri child in this case. In the first place, the record indicates that as a matter of fact the child had not resided in Colorado with the prospective adoptive parents for a period of six months, and in fact was not even six months old, when the Missouri circuit court denied the adoption and ordered the return of the child.[21] Without the

[21] The child was born in Missouri on April 18, 2003 and was brought to Colorado on April 21, after the Missouri court approved temporary placement with the prospective adoptive parents. On May 15, less than one month later, the court declined to approve termination of parental rights, and on July 25, the birth mother moved to withdraw her consent. On October 15, 2003, six days

authorization of Missouri's order of temporary custody, the child was no longer in the custody of persons acting as parents, and that status could therefore not support a claim that this was the child's "home state." See § 14-13-103, 5 C.R.S. (1999)(Repealed July 2000, Ch. 320, sec. 1, § 14-13-101 - 403, 2000 Colo. Sess. Laws 1519)(defining "home state" as the state where the child lived with his parents, parent or person acting as parent, for at least six months). Moreover, I would reject E.E.B.'s declination-of-jurisdiction rationale, at least as understood by the majority to characterize any legislative determination of custody, without separately allowing a judicial assessment of the

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short of the six-month residence period, the court granted the mother's motion and ordered physical custody restored to her. On October 31, 2003, two weeks after the Missouri court had ordered that physical custody of the minor child be returned to his mother, the prospective adoptive parents filed for parental responsibilities in Jefferson County.

"best-interests" of the child, as declining to exercise jurisdiction over the question of custody altogether.[22] The shortcomings in that construction have been adequately exposed else where, see In re Clausen, 442 Mich. at 675, n.31, and most recently by the National Conference itself in expressly drafting the UCCJEA to more emphatically protect against any similar interpretation.

Although its purpose in doing so in this jurisdictional debate is not entirely clear to me, the majority also asserts that both the UAA and Missouri domestic law support Colorado's holding in C.C.R.S. that custody determinations based on a

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[22] To the extent that E.E.B. suggested that a declination of jurisdiction would nevertheless not have occurred if, upon consultation, the other state expressly denied any intent to decline jurisdiction, see E.E.B., 446 A.2d at 880, its holding would not support the broader proposition for which it is cited by the majority. In this case, the Colorado District Court actually did consult with the Missouri court and decided that the Missouri court did not intend to decline jurisdiction.

"best-interest" analysis by the courts are required after failed adoptions.[23] While the UAA, unlike either Colorado or Missouri law, limits to a handful of days the period within which a natural mother may unilaterally revoke her initial consent to adoption, it most certainly does not permit the courts to reassign custody away from a natural mother who had custody of her child before the placement, as long as the court finds a valid revocation of consent.[24]

[23] I do not agree with the majority's suggestion that section 19-5-104(8) offers support for the holding of C.C.R.S., see maj. op. at 15, and apparently neither did C.C.R.S. The "best-interests" custody determination mandated by section 19-5-104(8) is clearly limited to the situation in which parental rights have already been relinquished but clear and convincing evidence proves that such relinquishment was obtained by fraud or duress. See § 9-5-104(7) & (8). Much like the "best-interests" custody determination required by Missouri law following an illegal placement by a parent, see In re Baby Girl, 850 S.W.2d 64 (Mo. 1993), under such special circumstances, the legislature has clearly determined that automatic return of a child to the former parent would be inappropriate.

[24] The UAA provides for the child's care and custody after a failed adoption in a manner that carefully balances the natural parent's rights against the child's best interests. To that end, it describes a series of circumstances in which custody of the child reverts immediately to the

Similarly, Missouri would clearly not permit guardianship of a child to be granted to a third party, outside of a proceeding contemplating the relinquishment of parental rights.

Even a cursory review of Missouri law is enough to dispel the suggestion that it permits, much less requires, a "best-interest" hearing before returning custody to the mother under these circumstances. The statute and case law relied upon by the majority for its assumption that Missouri requires such "best-interest" custody determination following failed adoptions are expressly limited to the case of an illegal transfer of custody, which necessarily brings into question the continued fitness

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parent and those instances in which custody must go to someone other than the parent. See Unif. Adoption Act § 2-408, 9 ULA at 60-61. The UAA permits the court to issue an order providing for the care and custody of the child according to the child's best interest after consent is revoked or set aside only if the child was not in the mother's physical custody when placed for adoption or when the consent was given. Unif. Adoption Act § 2-408(f), 9 ULA at 61.

of the natural parent. See In re Baby Girl, 850 S.W.2d 64 (Mo. 1993) (construing Mo. Ann. Stat. § 453.110(1) (West 2004): "Illegal placement of children available for adoption").

In fact, the Missouri statute permitting the court to award custody to someone other than the parent if the court denies an adoption petition says nothing about "best-interest." See Mo. Ann. Stat. § 453.101 ("In the event that the juvenile court does not grant the adoption, the court may order that a guardian be appointed . . . ."). Significantly, Missouri would permit the court to appoint someone other than the parent as guardian after the adoption is denied only under specified circumstances, including where both parents failed to give required security, both parents are shown to be unfit or adjudged incapacitated, the minor is over fourteen years old and has no qualified parent, or both

Supreme Court, U.S.
FILED
04 184 AUG 2 - 2004
OFFICE OF THE CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

C.M.C.,

PETITIONER,

versus

G.A.L. and K.L.,

RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE COLORADO SUPREME COURT

APPENDIX, volume 3

ERIC A. SAMLER
Counsel of Record for Petitioner
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parents are dead. See Mo. Stat. Ann. § 475.045.[25]

Far from taking a position akin to Colorado's choice in C.C.R.S., see maj. op. at 16, Missouri does not apply its divorce law to adoption cases. Even where that state permits third-parties to obtain custody under its dissolution of marriage law, see Mo. Stat. Ann. § 452.375(5)(5) (permitting Missouri courts to award custody to third-parties only in divorce actions), it rejects the application of a best interest analysis to third-party custody petitions and requires a finding on the record that the parent is unfit, Cotton v. Wise, 977 S.W.2d 263, 264 (Mo. 1998); see also Jones v. Jones, 10 S.W. 3d 528, 537 (Mo. App. Ct. 1999)(rejecting earlier Missouri Court of Appeals cases, including In re K.K.M., 647 S.W.2d

[25] Nor does the record, such as it is, support the majority's suggestion that the Missouri court was required but failed to appoint a guardian ad litem in this case. See maj. op. at 17-18. Motions filed with the court by both parties clearly attest in their Certificates of Mailing that copies were mailed to an individual designated as Guardian Ad Litem.

886 (Mo. Ct. App. 1983), see maj. op. at 17, that applied a best interest analysis beyond parent versus parent custodial disputes).

Finally the majority comes to the Interstate Compact on the Placement of Children. The compact provides protocols for the interstate placement of children for adoption or foster care. Because the "sending agency" retains the same jurisdiction over custody matters that it would have had if the child had remained in the sending agency's state, § 24-60-1802, art. V(a), 7B C.R.S. (2003); and because the compact's broad definition of "sending agency," see § 24-60-1802, art. II(b), includes not only a party state but also its officers, employees, subdivisions, courts, and any person, corporation, association, charitable agency, or other entity that sends, brings, or causes to be sent or brought any child to another party state; the majority attributes to Missouri law the

astonishing proposition that a person assisting with the placement as an intermediary is the "sending agency," within the meaning of the compact, and personally has "jurisdiction" over the child, enabling that person, as distinguished from the courts of her state, to decide whether the child should be returned. Because an affidavit from the Missouri attorney of the prospective adoptive parents was attached to the petition filed in this court, indicating that she acted as the intermediary in this case and that she "sought no such outcome," maj. op. at 41, the majority therefore considers itself free to disregard the order of the Missouri circuit court commanding return of the child to that state.

It is a mystery why the majority would feel obliged to defer to a sister state's construction of an interstate compact, which we have ourselves adopted and construed, see, e.g., Dept. of Soc. Services v.

Dist. Court, 742 P.2d 339 (Colo. 1987), when it is unwilling even to defer to that state's construction of its own law regarding custody in the wake of a failed adoption. In any event, in fairness to Missouri's high court, I must disagree with the majority's reading of Missouri's construction of the compact. In In re Baby Girl, 850 S.W.2d at 68-69, the Missouri court clearly finds that even an individual mother who attempts an illegal transfer of custody is a "sending agency" within the meaning of the compact, thereby making the compact applicable; but it just as clearly concludes from the terms of the compact that the appropriate court of the sending state -- specifically, "the Circuit Court of Dunklin County" -- therefore retains jurisdiction over the child. The unremarkable proposition that a sending agency could have no more authority over the child, had it "remained in the sending agency's state," than is

permitted by the courts of that state, is implicitly accepted, without question, by this and other states applying the compact. See, e.g., Dept. of Soc. Services, 742 P.2d at 341 ("Based upon our interpretation of the Interstate Compact, the Ohio court's continuing jurisdiction, and HCDHS's withdrawal of its consent to the placement of (the children) . . . ."); [26] Broyles v. Ashworth, 782 S.W.2d 31, 33-34 (Tex. App. 96th Dist. Ct. 1989) ("We interpret the statute as meaning that whatever authority the sending agency might have with respect to custody and disposition of the child . . . is to be determined according to the law of the sending agency's state.").

More fundamentally, however, the ICPC

[26] Although a special concurrence in that case by Justice Mullarkey would have made the majority's distinction between adoption and custody, and would have similarly relied on E.E.B. for the proposition that Colorado could determine the custody of the children rather than returning them to Ohio, in 1987 that position did not win the day. See maj. op. at 28.

addresses the treatment and disposition of the child "during the period of the placement." See § 14-13-103(Official Comment). It does not purport to deprive the sending state of jurisdiction over the adoption or provide for separate orders of custody following denial of an adoption. Although the UCCJEA does not govern adoptions themselves, its comments indicate that it may be necessary to apply the Act to adoption proceedings in a number of instances, including those in which a separate custody determination is required after an adoption is denied. See Id. To the extent that the majority's jurisdictional analysis is premised upon a distinction between Missouri's adoption order and a subsequent determination of the custody of the child, jurisdiction over that custody determination is governed by the UCCJEA.

The Missouri court did not decline to rule on

the custody of the child. The Missouri statutes permit the appointment of a guardian for a child following a failed adoption for long-term care of the child, but they also specify the limited circumstances in which the court may appoint someone other than the parent as guardian. The Missouri circuit court found that neither consent nor any lack of fitness of the mother permitted the adoption to proceed. In the absence of any condition recognized by the Missouri statutes permitting the appointment of a guardian other than the parent, it ordered custody returned to her. Even the majority agrees that Missouri, rather than Colorado, was the proper jurisdiction to make such a custody determination, unless it declined to exercise that jurisdiction. The majority simply refuses to recognize the Missouri court's custody order because it was not based upon the same substantive criteria that would have been

applied by the courts of this jurisdiction.

The majority rationale in this case is truly a textbook example of the evil that the UCCJA was rewritten to abolish. Its uncritical reliance on the mantra of "best-interests" to create an additional basis for jurisdiction fosters the very jurisdictional uncertainty and conflict among child-custody orders that the National Conference sought to eliminate - in the service of the child's best interests. Ironically, because most states have separate statutes already governing adoptions, custody disputes arising from interstate adoptions were not even among the problems that the UCCJEA felt a need to specifically address. Hopefully, this inauspicious beginning for the UCCJEA in Colorado does not portend another thirty-years war between states seeking to substitute their own notions of a child's best interests for those of their sister states.

I respectfully dissent.

X District Court
Jefferson County, Colorado
Court Address: 100 Jefferson County Parkway
Golden, CO 80401
Telephone: 303-569-3272

THE PEOPLE OF THE STATE OF COLORADO

In the Interest of:

ALEXANDER JOHN CAMP, A Minor Child
(DOB 04/18/03)

Upon the Petition of:

COLLEEN MARIE CAMP, Petitioner

And Concerning:

GREGORY ALAN LAND
VALERIE KAYE LAND, Respondents.

Case Number: 03 DR 2893
Division Courtroom

Attorney:
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35715 U.S. Highway 40, Suite 105-D
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E-mail: ginny@adoptionchoices.org
FAX: (303) 670-4405 Atty. Reg. # 33906

ORDER DISMISSING RESPONDENT'S VERIFIED PETITION FOR ALLOCATION OF PARENTAL RESPONSIBILITIES

THIS MATTER comes before this Court on a *Verified Petition for Allocation of Parental Responsibilities*. The Court, having reviewed the Petition, and any responses thereto, being fully advised, orders as follows:

1. The initial custody termination regarding the child who is the subject of this action was made in the Circuit Court of St. Charles County Missouri;
2. Petitioner Natural Birth Mother withdrew her Consent to Termination of Parental Rights and Consent to Adoption pursuant to Missouri law;
3. On October 15th, 2003, Joseph R. Briscoe, Administrative Judge of the Family Court, Circuit Court of St. Charles County Missouri, granted Petitioner Natural Birth Mother's

Motion to Dismiss Petition for Adoption and ordered that "physical custody of the minor child shall be restored to the natural mother, Colleen Camp, forthwith."

4. County of Jefferson, State of Colorado does not have jurisdiction in this case to grant Respondent's Petition for Allocation of Parental Responsibilities as the State of Missouri has retained exclusive and continuing jurisdiction.

IT IS SO ORDERED that the Respondent's Petition is hereby dismissed.

Executed this 3rd day of January, 2004, N.P.T. 12/4/03.

___/s_Stephen M. Munsinger_____
Judge/Magistrate

DISTRICT COURT, JEFFERSON COUNTY, COLORADO
Court Address: 100 Jefferson County Parkway
Golden, CO 80401

Case Number: 03 DR 2893
DIVISION 11
COURTROOM: 4-D

THE PEOPLE OF THE STATE OF COLORADO

In the Interest of:

ALEXANDER JOHN CAMP,
Minor Child,

Upon the Petition of:

COLLEEN MARIE CAMP, Petitioner

And Concerning:

GREGORY ALAN LAND
VALERIE KAYE LAND, Respondents.

ORDER

THIS MATTER comes before this Court upon Petitioner's Response to Motion to Dismiss and Petition for Writ of Habeas Corpus or in the Alternative, for Post-Trial Relief. The Court, having reviewed the pleading, court file, and applicable

rules and law issues the following Order.

The Court finds this Court ruled on December 4, 2003 during a telephone conference that Judge Briscoe had original jurisdiction of this case, therefore, this Court did not have jurisdiction and the case was ordered closed. Despite the allegations in the Response, the Court never issued a written order.

In as much as counsel asks this Court to reconsider any previous orders, any request for such relief is **DENIED**. Counsel may have 30 days from the date of this Order t request post-trial relief. Counsel may receive a copy of the minute order from the clerk's office if counsel so desires, but no written order will be forwarded.

Done in Golden, Colorado this 13th day of January 2004

BY THE COURT:

___/s_____
Stephen M. Munsinger

District Court Judge

Counsel is ordered to mail copies

of this document to all other

Parties of Record or their Counsel

within 48 hours of receipt and furnish

to the Court a Certificate of mailing

within one week

IN THE CIRCUIT COURT OF
ST. CHARLES COUNTY, MISSOURI

FAMILY COURT DIVISION

IN THE INTEREST OF:	)	
	)	
ALEXANDER JOHN CAMP	)	
	)	Cause No. JU103-180A
	)	
GREGORY ALAN LAND and	)	
	)	
VALERIE KAYE LAND,	)	
Petitioners.	)	

JUDGMENT OF DISMISSAL OF PETITION OF ADOPTION

On the 21st day of April, 2003, Petitioners filed a two-count petition seeking termination of the parental rights of the natural parents of Alexander John Camp ("minor child"), transfer of legal custody of the minor child to Petitioners and adoption of the minor child. On that same day, Petitioners filed a Motion for an Emergency Order for Transfer of Custody of the minor child to Petitioners.

Also on that same day, Petitioners filed a document signed by the minor child's natural mother entitled "Transfer of Temporary Custody and Appointment of Power of Attorney [sic] for Care of Child," under the authority of section 475.024 RSMo, which authorizes a parent of a minor to "delegate to another individual, for a period not exceeding one year, any of his powers regarding care of custody of the minor child, except his power to consent to marriage or adoption of the minor child." The presiding judge of this court, in the absence of the administrative judge of the family court, granted Petitioners' motion and entered a judgment approving the "preliminary placement" of the minor child with Petitioners and retaining jurisdiction for the purpose of further proceedings.

With the above documents, the court received a Consent to Termination of Parental Rights and

Consent to Adoption executed by the minor child's natural mother on April 21, 2003, whose signature was properly notarized and also witnessed by the signatures of two adult witnesses. The consent was given on a Form MO 886-3539(7-98) developed and promulgated by the Missouri Department of Social Services under the mandate of subsection 453.030.9, RSMo.

As authorized by subsection 453.030.6, RSMo, the court, in lieu of approving the natural mother's consent, entered an order on May 15, 2003, that the consent was not approved because "Said Consent did not identify the name of any possible father of the child. The court requires testimony before the court by the birth mother so that the court can determine if it is possible to identify any and all possible fathers." On July 25, 2003, before the court heard any testimony, the natural mother filed a Motion to

Withdraw and Revoke Consent to Termination of Parental Rights and Consent to Adoption. After a hearing, the court granted the natural mother's Motion and scheduled a later hearing on the issue of the temporary custody of the minor child.

August 22, 2003, Petitioners filed a First Amended Petition for Termination of Parental Rights and Adoption. On September 9, 2003, the natural mother filed a Motion to Dismiss the petition for adoption. On September 12, 2003, Petitioners and the natural mother appeared by counsel. The court took the natural mother's Motion under advisement and ordered that the minor child remain in Petitioners' temporary custody until further order of the court.

On September 26, 2003, Petitioners filed their Second Amended Petition for Termination of Parental Rights and Adoption. Both the First

Amended Petition and the Second Amended Petition were filed without seeking leave of court to file an amended petition.

The original Petition alleges that the natural mother consented in writing to the termination of parental rights and that the minor child's natural father is unknown. The First Amended Petition alleges that the natural mother has identified Demetrias Curtez as the father of the minor child and alleges the natural mother's abandonment of the minor child. The Second Amended Petition deletes the allegation that the natural mother consented in writing to the termination of her parental rights and adds an allegation that "The Natural Mother has a mental condition which is shown by competent evidence either to be permanent or such that there is no reasonable likelihood that the condition can be reversed and which renders the parent unable to

knowingly provide the child with the necessary care, custody and control."

In any adoption of a child under the age of 18 years, the court must receive the written consent of the child's natural mother and natural father (453.030.3, RSMo). This written consent "may be withdrawn anytime until it has been reviewed and accepted by a judge" (453.030.7, RSMo).

Section 453.040, RSMo, however, provides that consent of these parties is not required of:

"(1) A parent whose rights with reference to the child have been terminated pursuant to law. . ." In this case, the minor child's parents' rights have not been so terminated.

"(2) A parent of a child who has legally consented to a future adoption of the child." The court has received no such consent from either parent.

"(3) A parent whose identity is unknown and

cannot be ascertained at the time of filing of the petition. At the time of the filing of the original Petition, there was no evidence of the minor child's father's identity. Subsequently, in their amended petitions, Petitioners alleged that the natural mother had identified the minor child's father.

(4) (This subsection is not applicable here.)

"(5) A parent or other person who has not executed a consent and who, after proper service of process, fails to file an answer or make an appearance" in subsequent proceedings. There has been no service of process on any person whose consent is otherwise required.

"(6) A parent who has a mental condition which is shown by competent evidence either to be permanent or such that there is no reasonable likelihood that the condition can be reversed and which renders the parent unable to knowingly provide the child the

necessary care, custody and control." Petitioners made no such allegation about the natural mother for more than five months after filing their original petition in this cause and only after the natural mother had withdrawn her consent. Petitioners made only a bare allegation that the natural mother has such a mental condition and their allegation is not supported by affidavit or medical records.

"(7) A parent who has for a period of at least . . .sixty days for a child under the age of one year of age, immediately prior to the filing of the petition for adoption, willfully abandoned the child . . ." On April 19, 2003, on the day following the minor child's birth, the natural mother –for reasons not apparent on the record– placed temporary custody of the minor child with Petitioners, as permitted by section 475.024 RSMo. She agreed to pay Petitioners a stated daily rate for their care of the child in the event that she

later wished to resume physical custody of the child.

The court concludes that:

1. The natural mother did not abandon the child for purposes of later adoption because:

A. She arranged for her child's care by persons appearing from the record to be suitable caretakers for the child and arranged to compensate there persons for that care.

B. If there was abandonment, there was no abandonment for sixty days immediately prior to the filing of the original petition for adoption. Although the natural mother was not personally caring for the child for sixty days prior to the filing of the First Amended and Second Amended petitions, there was no

court order permitting her to have the child in her physical custody.

2. The natural father did not abandon the minor child. Abandonment requires, at a minimum, that the parent with an obligation to provide a child's care and support have knowledge of the child's existence. There is no evidence in the record that the natural father of this minor child has any knowledge of the child's birth or of the child's present circumstances.

3. The natural mother has withdrawn her consent to termination of her parental rights and consent to adoption before such consent was reviewed and approved by a judge.

THE COURT, THEREFORE, ORDERS, ADJUDGES AND DECREES as follows:

The natural mother's Motion to Dismiss is

GRANTED.

The physical custody of the minor child shall be restored to the natural mother, Colleen Camp, forthwith.

SO ORDERED:

s/_____ October 15, 2003
Joseph R. Briscoe #21628 Date
Administrative Judge of the
Family Court

IN THE CIRCUIT COURT OF
ST. CHARLES COUNTY, MISSOURI

FAMILY COURT DIVISION

IN THE INTEREST OF:	)	
	)	
ALEXANDER JOHN CAMP	)	
d.o.b. April 18, 2003	)	
	)	Cause No. JU103.180 A
	)	
GREGORY ALAN LAND and	)	
VALERIE KAYE LAND,	)	
Petitioners.	)	

JUDGMENT DENYING PETITIONER'S MOTION TO VACATE JUDGMENT

The court entered a Judgment of Dismissal of Petition of Adoption on October 15, 2003. Petitioners have timely filed a Motion to Vacate Judgment. That motion was heard on December 5, 2003, and the court ook the cause under submission.

The court's file clearly reflects that the child's mother ("Mother") willfully and intentionally transferred custody of the minor child to Petitioners

on April 19, 2003, with the understanding that Mother may change her mind in the future and that, if she did change her mind, she would pay Petitioners $20.00 a day for each day that Petitioners cared for the child.

The court's file also shows that Mother executed a written Consent to Termination of Parental Rights and Consent of Adoption on April 12, 2003. The court did not approve the said consent and scheduled the issue of Mother's consent for a hearing. Before the hearing was held Mother, on July 25, 2003, filed a motion with the court to withdraw her consent, as permitted by subsection 453.030.7, RSMo.

Petitioners filed a Second Amended Petition alleging that the natural mother has abandoned the minor child and that the court shoujld terminate Mother's parental rights as a result.

Petitioners call the court's attention to the

decision in *L., C.B. and J.L. v. L, K.E.*, 937 S.W.2d 734 (Mo. App., E.D., 1990). The court there held that "failure to support alone" does not warrant termination of parental rights and that neglect "is ultimately a question of an intent to forego parental duties." Id., at 737.

> In a case for termination of parental rights based only on the ground of abandonment under sections 453.040(1) and 211.447.2(1)(b), two conditions must be shown. It must be proven that the parent, without good cuase, left the child: (1) without any provision for parental support; and, (2) without making any arrangements to visit or communicate with the child, although able to do so. Section 211.447.2(1)(b). Abandonment focuses on the parent's intent taking into consideration all evidence of the parent's conduct, including conduct before and after the statutory period. [Citation.]

In the Interest of G.M.T., a minor, 965 S.W.2d 200, 202 (Mo.App., E.D. 1998).

Mother did not leave the child without any provision for support. Both conditions cited in *G.M.T.* must be met, so Petitioners have not met the

two-pronged test required to show abandonment. Mother's agreement to pay for the cost of the child's care in the event that she changed her mind about consenting to termination of her parental rights shows that she did not intend to forego her parental duties.

The court's decision *In the Matter of D. and D., OV and MV*, 408 S.W.2d 361 (Mo.App., Spfld., 1966) was rendered before the adoption of subsection 453.030.7, RSMo, in 1997 and is, therefore, inapplicable.

In *State ex rel. L.L.B. v. Eiffert*, 775 S.W.2d 216, 219 (Mo. App., S.D., 1989) the court held, "An adoption proceeding is not a forum for a determination of custody between parents." The court here is not determining whether Mother or the minor child's alleged father should have custody as between them. Rather, the court is determining as a

matter of law that Mother has effectively withdrawn her consent to the termination of her parental rights and the adoption of the minor child by Petitioners and that Mother has not abandoned the minor child. The consequence of that determination is that the child shall be returned to Mother's custody. Any determination of whether Mother or the alleged father should have custody must necessarily await another proceeding.

The court, therefore, ORDERS, ADJUDGES AND DECREES that Petitioner's Motion to Vacate Judgment of Dismissal of Petition for Adoption is DENIED.

SO ORDERED:

s/_____ January 2, 2004
Joseph R. Briscoe #21628 Date
Judge

SUPREME COURT, STATE OF COLORADO
Two East 14th Avenue Case No. 04 SA 18
Denver, Colorado 80203

ORIGINAL PROCEEDING
DISTRICT COURT JEFFERSON COUNTY,
03DR2893

In re:

THE PEOPLE OF THE STATE OF COLORADO,

In the interest of:

Minor Child :

A. J. C.:

DOB: 04/18/03

Petitioners:

G. A. L. and V. K. L.,

and concerning :

Respondents:

C.M.C. and D. C.

ORDER OF COURT

Upon consideration of the Petition for Rehearing

filed in the above cause, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED THAT said Petition shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, MAY 03, 2004.

JUSTICE COATS would grant the Petition.

Supreme Court
COURT SEAL
State of Colorado

Copies mailed via the State's Mail Services Division on 05/03/04 HOP

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United State Constitution, Art. IV sec. 1

Full Faith and Credit shall be given in each State to the Public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

28 U.S.C. sec. 1738A
(Parental Kidnaping Prevention Act)

§ 1738A. Full faith and credit given to child custody determinations

(a) The appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in subsections (f), (g), and (h) of this section, any custody determination or visitation determination made consistently with the provisions of this section by a court of another State.

(b) As used in this section, the term--

(1) "child" means a person under the age of eighteen;

(2) "contestant" means a person, including a parent or grandparent, who claims a right to custody or visitation of a child;

(3) "custody determination" means a judgment, decree, or other order of a

court providing for the custody of a child, and includes permanent and temporary orders, and initial orders and modifications;

(4) "home State" means the State in which, immediately preceding the time involved, the child lived with his parents, a parent, or a person acting as parent, for at least six consecutive months, and in the case of a child less than six months old, the State in which the child lived from birth with any of such persons. Periods of temporary absence of any of such persons are counted as part of the six-month or other period;

(5) "modification" and "modify" refer to a custody or visitation determination

which modifies, replaces, supersedes, or otherwise is made subsequent to, a prior custody or visitation determination concerning the same child, whether made by the same court or not;

(6) "person acting as a parent" means a person, other than a parent, who has physical custody of a child and who has either been awarded custody by a court or claims a right to custody;

(7) "physical custody" means actual possession and control of a child;

(8) "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a territory or possession of the United States; and

(9) "visitation determination" means a judgment, decree, or other order of a court providing for the visitation of a child and includes permanent and temporary orders and initial orders and modifications.

(c) A child custody or visitation determination made by a court of a State is consistent with the provisions of this section only if--

(1) such court has jurisdiction under the law of such State; and

(2) one of the following conditions is met: (A) such State (i) is the home State of the child on the date of the commencement of the proceeding, or (ii) had been the child's home State within six months before the date of the commencement of the proceeding and

the child is absent from such State because of his removal or retention by a contestant or for other reasons, and a contestant continues to live in such State;

(B) (i) it appears that no other State would have jurisdiction under subparagraph (A), and (ii) it is in the best interest of the child that a court of such State assume jurisdiction because (I) the child and his parents, or the child and at least one contestant, have a significant connection with such State other than mere physical presence in such State, and (II) there is available in such State substantial evidence concerning the child's present or future care, protection, training, and personal

relationships;

(C) the child is physically present in such State and (i) the child has been abandoned, or (ii) it is necessary in an emergency to protect the child because the child, a sibling, or parent of the child has been subjected to or threatened with mistreatment or abuse;

(D) (i) it appears that no other State would have jurisdiction under subparagraph (A), (B), (C), or (E), or another State has declined to exercise jurisdiction on the ground that the State whose jurisdiction is in issue is the more appropriate forum to determine the custody or visitation of the child, and (ii) it is in the best interest of the child that such court

assume jurisdiction; or

(E) the court has continuing jurisdiction pursuant to subsection (d) of this section.

(d) The jurisdiction of a court of a State which has made a child custody or visitation determination consistently with the provisions of this section continues as long as the requirement of subsection (c)(1) of this section continues to be met and such State remains the residence of the child or of any contestant.

(e) Before a child custody or visitation determination is made, reasonable notice and opportunity to be heard shall be given to the contestants, any parent whose parental rights have not been previously terminated and any person who has physical custody of a child.

(f) A court of a State may modify a determination of the custody of the same child made by a court of another State, if--

(1) it has jurisdiction to make such a child custody determination; and

(2) the court of the other State no longer has jurisdiction, or it has declined to exercise such jurisdiction to modify such determination.

(g) A court of a State shall not exercise jurisdiction in any proceeding for a custody or visitation determination commenced during the pendency of a proceeding in a court of another State where such court of that other State is exercising jurisdiction consistently with the provisions of this section to make a custody or visitation determination.

(h) A court of a State may not modify a visitation determination made by a court of another State unless the court of the other State no longer has jurisdiction to modify such determination or has declined to exercise jurisdiction to modify such determination.

(6)

No. 04-184

Supreme Court, U.S.
FILED
OCT 13 2004
OFFICE OF THE CLERK

In The

Supreme Court of the United States

C.M.C.,

Petitioner,

versus

G.A.L. and V.K.L.,

Respondents.

On Petition For Writ Of Certiorari To The Colorado Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Respondents would state that the following more accurately reflects the issues raised by Petitioner's Petition for Writ of Certiorari:

1. Whether the Petitioner timely and properly raised the federal question before the Colorado Courts?

2. Whether the Parental Kidnaping Prevention Act is applicable to this case?

3. Whether the Questions Presented for Review in Petitioner's Petition for Writ of Certiorari warrant this Court's review?

4. Whether the provisions of the Full Faith and Credit Clause of the United States Constitution are implicated in this case?

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SECONDARY AUTHORITY

Waller, Greg, *When the Rules Don't Fit the Game: Application of the Uniform Child Custody Jurisdiction Act and PKPA to Interstate Adoption Proceedings*, 33 Harv. J. on Legis. 271 (1996) 9, 20

CITATIONS OF THE OFFICIAL REPORTS

As stated in the Petition for Writ of Certiorari.

STATEMENT OF THE BASIS FOR JURISDICTION

As stated in the Petition for Writ of Certiorari

CONSTITUTIONAL AND STATUTORY PROVISIONS

As stated in the Petition for Writ of Certiorari. Additionally:

C.R.S. 14-13-103. Proceedings governed by other law

This article does not govern an adoption proceeding or a proceeding pertaining to the authorization of emergency medical care for a child.

C.R.S. 14-10-123. Commencement of proceedings concerning allocation of parental responsibilities – jurisdiction

(1) A proceeding concerning the allocation of parental responsibilities is commenced in the district court or as otherwise provided by law:

(a) By a parent;

(I) By filing a petition for dissolution or legal separation; or

(II) By filing a petition seeking the allocation of parental responsibilities

with respect to a child in the court where the child is permanently resident or where the child is found; or

(b) By a person other than a parent, by filing a petition seeking the allocation of parental responsibilities for the child in the county where the child is permanently resident, or where the child is found, but only if the child is not in the physical care of one of the child's parents;

(c) By a person other than a parent who has had the physical care of a child for a period of six months or more, if such action is commenced within six months of the termination of such physical care; or

(d) By a parent or person other than a parent who has been granted custody of a child or who has been allocated parental responsibilities through a juvenile court order entered pursuant to section 19-1-104(6), C.R.S., by filing a certified copy of a juvenile court order in the county where the child is permanently resident. Such order shall be treated in the district court as any other decree issued in a proceeding concerning the allocation of parental responsibilities.

(2) Except for a proceeding concerning the allocation of parental responsibilities commenced pursuant to paragraph (d) of subsection (1) of this section, notice of the proceeding concerning the allocation of parental responsibilities

> shall be given to the child's parent, guardian, and custodian or person allocated parental responsibilities, who may appear and be heard and may file a responsive pleading. The court may, upon a showing of good cause permit the intervention of other interested parties.

STATEMENT OF THE FACTS AND CASE

The subject child was born on April 18, 2003 in the State of Missouri and was voluntarily placed with the Respondents by the Petitioner almost immediately after the child's birth for purposes of adoption. At or about the time of placement, Petitioner signed a Transfer of Temporary Custody and Appointment of Power of Attorney for Care of Child in favor of Respondents. This document provided that if Petitioner changed her mind regarding the adoption plan that she would reimburse Respondents $20.00 per day for which they had the child in their care. (Petition for Writ of Certiorari pg. 1 and Appendix to Petition for Writ of Certiorari pg. 10-11). Petitioner has neither reimbursed the Respondents nor offered to reimburse the Respondents.

On or about April 21, 2003, Respondents filed an adoption action in the Circuit Court of St. Charles County, Missouri seeking the termination of the parental rights of the Petitioner and the biological father to the subject child and Respondents ultimate adoption (hereinafter "adoption action"). The Missouri Court approved the placement of the child with the Respondents and the Respondents returned to their home in Jefferson County, Colorado. (Appendix to Petition for Writ of Certiorari pg. 10-11).

Subsequent thereto, however, the Court refused to accept Petitioner's consent to the adoption based on a technical defect in the form she presented to the Court. Specifically, Petitioner had failed to identify the biological father of the subject child as required by Missouri law. (*Id.* at 11-12). On July 25, 2003, some three (3) months after the child's birth and placement with Respondents, Petitioner filed a Motion to Withdraw and Revoke her Consent to the adoption. (*Id.* at 12). The same was granted on August 22, 2003. Importantly, the Missouri Court's Order stated nothing regarding the custody of the minor child, physical, legal or otherwise. (App. 1).

On October 15, 2003, after the child was almost six (6) months old and had resided essentially all of his life in Colorado, the Missouri Court, without holding an evidentiary hearing[1], dismissed the adoption action and awarded "physical custody of the minor child" to Petitioner. Specifically, the Missouri Court determined that no factual basis existed to terminate the Petitioner's parental rights in absence of Petitioner's consent under Missouri law despite Respondents' allegations to the contrary. (Appendix to Petition for Writ of Certiorari pg. 100-110). Respondents had alleged as grounds for involuntary termination of Petitioner's parental rights under Missouri law that Petitioner had abandoned the child and that her mental condition was such that she was "unable to knowingly provide the child with the necessary care, custody and

[1] *See* App. 31 where Petitioner states "*After hearing arguments of counsel, and after allowing the parties to brief the issues,* the [Missouri] court entered a ruling finding that the consent to terminate parental rights were revoked and that Respondent had not abandoned the child." (Emphasis added).

control." (*Id.* at 104-105). Respondents subsequently filed a Motion to Vacate Judgment with the Missouri Court. (*Id.* at 13). The Court, in denying the Motion on January 2, 2004, acknowledged that the Missouri case was not a custody proceeding stating:

> "'*An adoption proceeding is not a forum for determination of custody between parents.' The court here is not determining whether Mother or the minor child's alleged father should have custody as between them.* Rather, the court is determining as a matter of law that Mother has effectively withdrawn her consent to the termination of her parental rights and the adoption of the minor child by [Respondents] and that Mother has not abandoned the minor child. The consequence of that determination is that the child shall be returned to Mother's custody. *Any determination of whether Mother or the alleged father should have custody must necessarily await another proceeding.*" (Citation omitted) (Emphasis added) (*Id.* at 114-115).

The Court's denial of the Motion to Vacate Judgment did not indicate that Missouri would exercise continuing jurisdiction to determine the custody of the child. (*Id.*). Respondents appealed the dismissal of the adoption action to the Missouri Court of Appeals but later dismissed the same. (Petition for Writ of Certiorari pg. 4-5).

Prior to the Missouri Court's denial of the Motion to Vacate Judgment, and after the child had been in the Respondents care and lived in Colorado in excess of six (6) months, Respondents filed in the District Court for Jefferson County, Colorado a Verified Petition for Allocation of

Parental Responsibilities[2] (hereinafter "custody action") regarding the minor child. (Appendix to Petition for Writ of Certiorari pg. 15-16). In response to this Petition, Petitioner filed a Petition for Writ of Habeas Corpus and a Motion to Dismiss the Respondents' custody action. (*Id.* at 16). On or about December 4, 2004, the Jefferson County District Judge was contacted by the Missouri Judge to discuss the adoption action and the custody action. (*Id.* at 17, n. 9). No notice was given to the parties regarding this discussion. As a part of the conversation the Jefferson County District Judge concluded that the Order dismissing the adoption action in Missouri divested Colorado of jurisdiction over the custody action. (*Id.*). On January 8, 2004 Respondents filed a Response to the Motion to Dismiss and requested Post-Trial Relief. (*Id.* at 17). On January 13, 2004 the Jefferson County District Court entered an order denying Respondent's post-trial relief. (*Id.*).

Within one (1) week of the January 13, 2004 Order, Respondents filed a Petition for Rule to Show Cause with the Colorado Supreme Court pursuant to Colorado Appellate Rule 21 requesting that the Jefferson County District Court's Writ of Habeas Corpus and Order dismissing the custody action be reversed. (*Id.* at 17-18). Respondents argued, in part, that the adoption action was not a custody proceeding as contemplated by Colorado's Uniform Child Custody and Enforcement Act and therefore Respondents had standing to bring an "initial child-custody" proceedings in the State of Colorado, and even if the adoption action constituted a

---

[2] Colorado now uses the term "parental responsibilities" in place of the word "custody." In changing this terminology, the Colorado General Assembly's purpose was not to modify the meaning of the term "custody." C.R.S. § 14-10-103(4).

custody proceeding, Missouri's Order granting physical custody of the child to Petitioner was not entitled to full faith and credit as no evidentiary hearing regarding the best interests of the child was held. The Colorado Supreme Court issued a Rule to Show Cause on January 20, 2004. (*Id.* at 18). Petitioner filed a Response to the Rule to Show Cause. Contrary to Petitioner's assertions, she made absolutely no mention of the Parental Kidnaping Prevention Act of 1980 prior to the issuance of the Colorado Supreme Court's opinion. (App. 2 – App. 38). The Colorado Supreme Court made its Rule absolute finding that neither Colorado law, Missouri law, nor federal or interstate laws governing interstate custody disputes would mandate that Colorado not exercise jurisdiction to determine the best interests of the minor child. The matter was remanded back to the Jefferson County District Court for hearing on the child's best interests. (Appendix to Petition for Writ of Certiorari pg. 1-93).

Petitioner filed a Petition for Rehearing with the Colorado Supreme Court on April 26, 2004 arguing for the first time that the Court's ruling was contrary to the Parental Kidnaping Prevention Act of 1980. The same was denied on May 3, 2004. (*Id.* at 116-117 and Petition for Writ of Certiorari pg. 8). This appeal followed.

ARGUMENT

1. Whether the Petitioner timely and properly raised the federal question before the Colorado Courts?

Contrary to Petitioner's assertions in her Petition for Writ of Certiorari, she did not raise the issue of the applicability of the Parental Kidnaping Prevention Act of 1980

(hereinafter "PKPA") in her Response to the Colorado Supreme Court's Order to Show Cause. Rather, this issue was raised for the first time by Petitioner in her Petition for Rehearing filed pursuant to Colorado Appellate Rules 40 after the Colorado Supreme Court had rendered its opinion. United States Supreme Court Rule 14(1)(g)(i) states, in pertinent part, "If review of state-court judgment is sought, specification of the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised . . . so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on writ of certiorari." In Colorado, issues not raised in the parties' briefs before an appellate court will not be addressed on a Petition for Rehearing. *Elrick v. Merrill*, 10 P.3d 689, 696 (Colo.App. 2000).

Further, this Court has generally refused to consider issues raised for the first time in a Petition for Rehearing before the state courts. "It is well settled that this Court will not review a final judgment of a state court unless 'the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system.' Appellant did not present the issue squarely to the state courts until they filed their petition for rehearing with the court of appeals." *Bd. of Dirs. of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 550 (1987) *citing Webb v. Webb*, 451 U.S. 493, 496-497 (1981).

Nevertheless, the Colorado Supreme Court did address the applicability of the PKPA in its opinion. *See Adams v. Robertson*, 520 U.S. 83, 92 (1997) ("we have generally refused to consider issues raised for the first time in a petition for rehearing when the state court is

silent on the issue."). To the extent the Court believes the federal question was "timely and properly raised" before the Colorado Courts, Respondents address the substance of the Petition.

2. Whether the Parental Kidnaping Prevention Act is applicable to this case?

The PKPA applies to "child custody determinations." 28 U.S.C. 1738A(a). A "custody determination" is defined as "a judgment, decree, or other order of a court providing for the custody or visitation of a child, and includes permanent and temporary orders, and initial orders and modifications." One of the general rules of statutory construction is that words and phrases are to be given their plain and ordinary meaning. *See United States v. Locke*, 471 U.S. 84 (1985). Petitioner assumes, without discussion, that the adoption action in Missouri constitutes a "child custody determination" within the meaning of the PKPA.

Respondents would assert that the adoption action does not constitute a "child custody determination." *See In the Interest of B.A.S.*, 25 Ga.App. 430 (2002) (Questioning whether the PKPA applies to an adoption proceeding.) In fact, "the legislative history of the PKPA does not discuss the application of the statute to adoptions or prospective adoptive parents." Waller, Greg, *When the Rules Don't Fit the Game: Application of the Uniform Child Custody Jurisdiction Act and PKPA to Interstate Adoption Proceedings*, 33 Harv. J. on Legis. 271, 284 (1996). Respondents interpretation of the PKPA not applying to an adoption proceeding is consistent with the terms of the Uniform Child Custody Jurisdiction and Enforcement Act (hereinafter "UCCJEA").

The PKPA was enacted "to provide for a nationwide enforcement of custody orders made in accordance with the terms of the UCCJA."[3] *Thompson v. Thompson*, 484 U.S. 174, 181 (1988). Specifically, Colorado's UCCJEA states that its provisions do "not govern an adoption proceeding." C.R.S. 14-13-103.

3. Whether the Questions Presented for Review in Petitioner's Petition for Wrti of Certiorari warrant this Court's review?

Assuming that Petitioner "timely and properly raised" the issue of the PKPA and that the PKPA is applicable to an adoption proceeding Respondents address the contentions of Petitioner that this case warrants review by this Court. Petitioner argues that the Colorado Supreme Court erred in how it interpreted 28 U.S.C. 1738A(f) in finding that Missouri declined to exercise jurisdiction over the child custody issue, and because it did so, it further erred in failing to enforce the Missouri order and granting a custody hearing while the Missouri action was pending.

At first blush, in reviewing Petitioner's Petition for Writ of Certiorari, it would appear that the Colorado Supreme Court decided to simply ignore the proceedings in Missouri. This is not accurate. Rather the Colorado Supreme Court specifically acknowledged the adoption action in Missouri and indicated that it was required to give the dismissal of the adoption action full faith and credit. (Appendix to Petition for Writ of Certiorari pg. 19). The Colorado Supreme Court simply acknowledged the

[3] The UCCJA or Uniform Child Custody Jurisdiction Act is the predecessor to the UCCJEA.

very real difference between adoption cases and custody cases. *See M.L.B. v. S.L.J*, 519 U.S. 102, 118 (1996) *citing* (Blackmun, J., dissenting) *Lassiter v. Department of Social Servs. of Durham Cty.*, 452 U.S. 18, 39 (1981) ("A termination of parental rights is both total and irrevocable. Unlike other custody proceedings, it leaves the parent with no right to visit or communicate with the child. . . .")

a. The Missouri Court declined to exercise continuing jurisdiction over the issue of custody of the minor child.

The Missouri Court did in fact decline to exercise continuing jurisdiction over the issue of custody of the minor child. This is the case for two reasons. First, as the Colorado Supreme Court so held, Missouri failed to hold a evidentiary hearing regarding the best interests of the child (or any evidentiary hearing for that matter) and the same operates as a declination of jurisdiction under the PKPA. In so holding, the Court followed the reasoning of the New Jersey Supreme Court in *E.E.B. v. D.A.*, 446 A.2d 871 (N.J. 1982) a case with substantial similarities to the case at bar. Second, the Missouri Court itself determined that the issue of custody was not a proper one to be heard in an adoption case. As a result, that determination had to "necessarily await another proceeding." The bottom line is that the case at bar is extremely fact specific and review of the Colorado Supreme Court's decision by this Court will not have broad implications.

28 U.S.C. 1738A(a) states that "The appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in subsection (f) of this section, any child custody determination made consistently with the provisions of this section by a

court of another state." 28 U.S.C. 1738A(f) states that "A court of a state may modify a determination of custody of the same child made by a court of another State, if. . . . (2) the court of the other State no longer has jurisdiction, or *it has declined to exercise such jurisdiction to modify such determination*." (Emphasis added). Here, the Colorado Supreme Court, finding that the Missouri Court failed to hold a hearing on the best interests of the child in determining custody, held the same constituted a declination of jurisdiction pursuant to 28 U.S.C. 1738A(f). Again, this was in accord with the New Jersey Supreme Court decision in *E.E.B.*

Petitioner argues that because the Michigan Supreme Court reached a contrary holding in *In re Clausen*, 502 N.W.2d 649 (Mich. 1993) this Court should review the issue pursuant to United States Supreme Court Rule 10(b). The *Clausen* case is easily distinguished from the facts of the case at bar. *Clausen* involved a failed adoption proceeding in Iowa. The Iowa Court, after voiding its termination order as to the biological father, ordered the prospective adoptive couple to "return the child to the physical custody of [biological father]." *Id.* at 653. Thereafter, the prospective adoptive couple filed a custody action in their home state of Michigan. The Michigan Supreme Court found that it was precluded from deciding the custody of the child as Iowa continued to have continuing jurisdiction to make that determination. "The courts of this state, may only modify Iowa's order if Iowa has declined to exercise jurisdiction to modify it. 28 U.S.C. 1738A(f). Iowa has not declined to modify its custody order, it has simply declined to order the relief sought by [the prospective adoptive parents.]" *Id.* at 659. In so

holding, the Michigan Supreme Court placed a great deal of emphasis on the fact that the Iowa case was ongoing:

> "Iowa law provides for continuing jurisdiction in custody matters, and the Iowa courts regarded themselves as continuing to have jurisdiction of the case: the order of December 3, 1992, terminating the DeBoers' right to custody and appointing Daniel Schmidt as custodian, and the order of January 27, 1993, holding the Deboers in contempt. Because the Iowa custody determination was made consistently with the terms of the PKPA, and because Iowa's jurisdiction continues, the Iowa court's order must be enforced." *Id.* at 672.

This situation is quite different from the case at bar. As was referred to above and will be discussed below, the Missouri case was not ongoing. The adoption action was dismissed in its entirety. In dismissing the case the Court did not indicate that it retained jurisdiction to determine custody but rather indicated that an adoption case was not an appropriate forum to decide custody and the same would necessarily have to await another proceeding.

The fact that Missouri had dismissed its case was not specifically found by the Colorado Supreme Court to be a declination of jurisdiction under 28 U.S.C. 1738A. One can assume that this was because the Colorado Supreme Court assumed for purposes of its opinion that the Missouri Order was a custody determination implicating the provisions of the PKPA. It is clear, however, that the Court was in no way convinced of this issue:

> "The conundrum here is that if we view Missouri as having addressed the custody issue at all, it was only as a part of having recognized that the

> adoption failed. Hence, the order was a part of an adoption proceeding and the UCCJEA does not apply. If, on the other hand, we view the adoption and custody proceedings as separate proceedings, then Missouri has entered no custody order and Colorado will have initial original jurisdiction." (Appendix of Petition for Writ of Certiorari pg. 46).

Because the facts in *Clausen* show that the proceedings in Iowa were ongoing, unlike in the present case where the Missouri Court had dismissed the case all together and ruled that custody had to await another proceeding, there is no reason for this Court to review the Colorado Supreme Court's decision.

The *Clausen* decision can also be distinguished from the case at bar as the parties in that case were in fact afforded an evidentiary hearing. Specifically, in *Clausen* after termination of the rights of the birth mother and the individual she had alleged was the birth father had been entered the birth mother advised the Iowa Court that she had lied about the birth father's identity and in fact a Daniel Schmidt was the birth father. *Id.* at 658. "[T]he district court in Iowa conducted a bench trial on the issues of paternity, termination of parental rights, and adoption. . . . [T]he district court found that Schmidt established by a preponderance of the evidence that he was the biological father of the child; that the DeBoers failed to establish by clear and convincing evidence that Schmidt had abandoned the child or that his parental rights should be terminated." *Id.* No such evidentiary hearing was afforded to Respondents in this case even though they had alleged that Petitioner had abandoned the child or was

otherwise unable to parent the child based on her mental condition.[4]

Based on the substantial distinguishing facts in the *Clausen* case versus the case at bar, Respondents would assert that "a state court of last resort has [not] decided an important federal question in a way that conflicts with the decision of another state court of last resort." United States Supreme Court Rule 10(b). As a result, review by this Court of the Colorado Supreme Court's decision is not warranted.

Petitioner mistakenly asserts that "Colorado, in resolving custody disputes between a parent and a non-parent, does not recognize the natural parent's liberty interest in raising her child, but instead applies a 'best interest' standard as between the non-parent and the parent." (Petition for Writ of Certiorari pg. 22). This is simply inaccurate. For example, in *In the Interest of E.L.M.C.*, ___ P.3d ___ (Colo.App. 2004) the Colorado Court of Appeals held as follows:

> "Application of parental responsibilities – parenting time and decision making responsibilities – by a nonparent implicates the constitutional right of family autonomy and privacy. 'A legislative enactment that infringes on a fundamental

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[4] Respondents acknowledge that the Colorado Supreme Court ruled that Missouri's declination of jurisdiction was based on the Missouri Court's failure to hold a hearing on the best interests of the child and not on its failure to hold any evidentiary hearing. Respondents would assert, however, that Missouri Court's failure to hold any evidentiary hearing at all, much less an evidentiary hearing on the best interests of the child, is further proof that Missouri Court had declined to exercise jurisdiction and/or its order granting physical custody to Petitioner was not entitled to full faith and credit.

> right is constitutionally permissible only if it is necessary to promote a compelling state interest and does so in the least restrictive manner possible.' Hence, consistent with [*Troxel v. Granville*, 530 U.S. 57 (2000)] acknowledgment that this right 'is perhaps the oldest of the fundamental liberty interests recognized by [the] Court,' we join those courts that have concluded the strict scrutiny test applies to statutes which infringe on the parent-child relationship." (Citations omitted)

A similar result was reached in *In re Custody of C.C.R.S.*, 892 P.2d 246 (Colo. 1995) and *In re Custody of C.M.*, 74 P.3d 342 (Colo.App. 2002). In *C.M.* the Court of Appeals held that Colorado's best interests standard when deciding custody issues between parents and nonparents "is subject to the presumption that biological parent has a first and prior right to custody. That presumption may be rebutted by evidence establishing the welfare of the child is better served by granting custody to a nonparent." *Id.* at 345. Because of these constitutional protections, when the trial court ultimately conducts a hearing on the best interests of the child, Petitioner's wishes as to custody and parenting time will be given presumptive effect. Contrary to Petitioner's assertions, Colorado recognizes a parent's presumptive right to be with their child.

Petitioner also mistakenly asserts that "The Colorado Supreme Court ruled that because Missouri did not apply Colorado substantive law, Missouri declined to exercise jurisdiction." (Petition for Writ of Certiorari pg. 22). In fact, the Colorado Supreme Court viewed Missouri law in light of whether or not Colorado was able to proceed to make a custody determination:

> "Missouri, like Colorado, has recognized that in certain situations, a failed adoption does not automatically result in the custody of a child being restored to the natural parent(s). . . . Indeed, Missouri, like Colorado, emphasizes that the overreaching goal in all adoption and custody proceedings is the best interests of the child. . . . Thus, we conclude that Missouri's law, like Colorado's, supports the proposition that custody determinations, even after a failed adoption, must take into account the best interests of the child." (Appendix to Petition for Writ of Certiorari pg. 23-26).

It could be argued, that the Colorado Supreme Court was commanding nothing more than what was contemplated by the Missouri Court. That a custody determination, based on the best interests of the child, must necessarily await another proceeding.[5] The issue then becomes what state is the appropriate forum for this determination. Respondents would assert that Colorado is the appropriate forum under Colorado, Missouri and Federal law as concluded by the Colorado Supreme Court. Respondents had standing to bring a custody action in Colorado. C.R.S. 14-10-123(1)(b) and (c). The child has resided in Colorado essentially all his life and therefore Colorado is the home state of the child; Respondents, individuals acting as parents of the child reside in Colorado; and essentially all information and evidence regarding the child's best interests is in Colorado.[6]

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[5] It should be noted that the alleged birth father had not participated or received notice of the Missouri action.

[6] Home state is determined by the "state which can best decide the case in the interest of the child." Home state is defined as the "[s]tate

(Continued on following page)

b. The Colorado Supreme Court's ruling allowing for a hearing on Respondents' request for custody of the minor child is not a failure to either enforce the Missouri Decree or an attempt at modifying the Missouri Decree in contravention of the PKPA.

As is noted above, it is not even a foregone conclusion that the Missouri Order constitutes a custody determination implicating the provisions of the PKPA. Irrespective of this, as is stated above, assuming the PKPA applies to this case and the Missouri Order constitutes a custody determination, because Missouri declined to exercise continuing jurisdiction over the custody determination, Colorado is not prohibited from entering a custody order and/or modifying Missouri's Order pursuant to 28 U.S.C. 1738A(f)(2).

c. The Colorado Supreme Court's ruling allowing for a hearing on Respondents' request for custody of the minor child is not a violation of the PKPA prohibition on the exercise of jurisdiction over a child custody dispute during the pendency of a proceeding in another state.

Petitioner asserts that Colorado's interpretation of 28 U.S.C. 1738A(f), like that of New Jersey's Supreme Court in *E.E.B.* encourages "as here, simultaneous litigation in two different states." (Emphasis omitted). (Petition for Writ

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immediately preceding the time involved, the child lived with his parents, a parent, or a person acting as a parent, for at least six consecutive months, and in the case of a child less than six months old, the state in which the child lived from birth with any such persons." 28 U.S.C. 1738A.

of Certiorari pg. 23). Again, the Missouri Court "dismissed" the adoption action specifically finding that a determination on "custody must necessarily await another proceeding." As a result, there was no proceeding pending in Missouri and therefore there was not simultaneous proceedings. Nor is it of consequence that Respondents appealed the decision of the Missouri Court dismissing the adoption action. As aptly stated by the Colorado Supreme Court:

> "At the present time, there is an appeal pending in the Missouri Court of Appeals.[7] This appeal involves the dismissal of the Petitioner's Petition for Adoption. Specifically, the appeal addresses whether Mother's withdrawal of her consent to the adoption was valid. However, this appeal does not change the focus of our analysis. To the contrary, this appeal supports the notion that the failed adoption proceedings, to which we are according full faith and credit, are separate and distinct from the issue we address today, namely whether Colorado has jurisdiction to determine who should have custody of A.J.C. Stated differently, this is not a case where the Petitioners seek to re-litigate in Colorado the unfavorable result reached in the Missouri adoption proceedings. Rather, the Petitioners seek an independent custody determination that reflects the best interests of A.J.C." (Appendix to Petition for Writ of Certiorari pg. 15, n. 7).

[7] In fact, by the time the Colorado Supreme Court issued its opinion the Respondents had dropped their appeal in Missouri.

4. Whether the provisions of the Full Faith and Credit Clause of the United States Constitution are implicated in this case?

U.S. Const. Art. IV, Sect. 1, provides that states must give full faith and credit to the judicial determinations of other states. The PKPA is a codification of this constitutional provision in the context of child custody cases. However, "A state court judgment generally is not entitled to full faith and credit unless it satisfies the requirements of the Fourteenth Amendment's Due Process Clause." (Ginsberg, J., concurring in part and dissenting in part), *Matsushita Elec. Industrial Co. v. Epstein*, 516 U.S. 367, 388 (1996) *citing Kreimer v. Chemical Constr. Co.*, 456 U.S. 461 (1982). The right of due process, at its essence is the right to be given notice and the opportunity to be heard. *LaChance v. Erickson*, 522 U.S. 262 (1988). Here, neither the minor child nor the Respondents were given an opportunity to be heard in a meaningful manner through an evidentiary hearing to determine the best interests of the child. *See When the Rules Don't Fit the Game* at 311 ("interest of a child caught in the middle may be independent of the interests of the biological parent."). Nor was the minor child and the Respondents provided an evidentiary hearing on their allegations that Petitioner had abandoned the child or that her mental condition was such that she was "unable to knowingly provide the child with the necessary care, custody and control" a parent is required to provide. These are grounds for involuntary termination in Missouri. Mo. Rev. Stat. 453.040. This being the case, Respondents would assert that the Missouri Order was not entitled to full faith and credit.

CONCLUSION

Respondents respectfully request that this Court deny Petitioner's Petition for Writ of Certiorari.

Respectfully submitted this 13th day of October, 2004.

BELTZ, EDWARDS, SABO & WEST, LLP
W. THOMAS BELTZ
DANIEL A. WEST
Attorneys for Respondents

IN RE:

The Matter of:
Alexander Camp
VS.

No. JU. 103-180A

IN THE
CIRCUIT COURT
FAMILY COURT DIVISION
County of St. Charles,
Missouri

August 22, 2003

Judgment & Order

Cause called on birth mother's Motion to Withdraw her Consent to Termination of Parental Rights and Consent to Adoption.

Birth Mother, Colleen Camp Motion to Withdraw her Consent to Termination of Parental Rights is hereby granted

So Ordered

/s/ _____
Commissioner

/s/ Joseph R. Briscoe
Judge

8/22/03
Date

/s/ Colleen Camp
Colleen Camp ~~Attorney~~

/s/ Frances M. Weir 45938
Birth Mother's Attorney

_____
GAL/Juvenile Officer

SUPREME COURT, STATE OF COLORADO 2 E. 14th Avenue Denver, CO 80203 Original Proceeding Jefferson County District Court Case Number 03DR2893	% COURT USE ONLY %
In re: **The People of The State of Colorado** **In the Interest of:** **Minor Child** **DOB: 04/18/03** **Petitioners:** **G.A.L. and V.K.L** **And concerning** **Respondents:** **C.M.C. and D.C.**	Case Number: 04SA18
Eric A. Samler, #32349 For the Respondent C.M.C. Samler and Whitson, P.C. 1776 Lincoln Street, Suite 1010 Denver, Co 80203 303-670-0575 (phone) 303-670-0574 (fax) esamler@colorado-appeals.com Virginia L. Frank #33906 For the Respondent C.M.C. 35715 U.S. Highway 40 Suite 105-D Evergreen, CO 80439 (303) 670-4401 ginny@adoptionchoices.com	
RESPONSE TO ORDER TO SHOW CAUSE	

(Filed Jan. 30, 2004)

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Respondent C.M.C., by and through counsel Eric A. Samler and Virginia L. Frank, in response to the Order to Show Cause Issued herein, and pursuant to *In re Custody of K.R.*, 897 P.2d 896 (Colo. App. 1995), C.R.S. §§14-13-303, -203, and -206, U.S. Const. Art. IV Sec. I and *Marworth Inc v. McGuire,* 810 P.2d 653 (Colo. 1991), respectfully requests that this Court discharged the Order to Show Cause, and further requests that this Court remand this matter to the district court for the limited purpose of determining whether pursuant to C.R.,S. §14-13-312 Respondent C.M.C. is entitled to attorney fees and costs, and if so the amount to which she is entitled. In support thereof, Respondent C.M.C. states as follows:

FACTUAL BACKGROUND

On the date of the child's birth, the child's mother signed a document agreeing to temporarily transfer legal custody of her child to the Petitioners. The agreement provided that the child's mother may change her mind and take back physical custody of her child. If she did so, she would become obligated to reimburse the Petitioners in the amount of $20 per day for each day the child is with the Petitioners. The child's mother also signed a consent to termination of parental rights and consent to adoption. Pursuant to Missouri law, the consent to termination must be approved by the court and a parent may withdraw the consent at any time prior to the court's approval of the consent. Mo. St. 453.030(7).

Petitioners signed a document entitled Legally at Risk Placement acknowledging that the placement of the child is "legally at risk" until the parents' parental rights are terminated. The document further provides that in the

event termination of parental rights does not occur, they will return the child to the mother's intermediary. Petitioners filed with the Circuit Court for St. Charles County a Petition to Adopt the Minor Child and terminate mother's parental rights. Prior to the court accepting her consent to adoption and termination of parental rights, mother, as permitted by Missouri law, filed a motion to revoke her consent. The Circuit Court accepted her motion to revoke, dismissed the Petition for Adoption and awarded custody of the infant to his mother. Pursuant to Colorado law, an order dismissing an adoption proceeding and awarding custody of the child to his natural parent is a custody decree. *In re Custody* of K.R., *supra; IRM Dickson*, 983 P.2d 44 (Colo. App. 1998).

Immediately after the Missouri Court awarded custody of the child to his mother, Petitioners filed a Petition in Colorado for allocation of parental rights. While their Colorado Petition was pending, Petitioners filed with the Circuit Court for St. Charles County Missouri a motion to vacate the order granting physical custody of the minor child to the child's natural mother. That Motion was denied. Upon information and belief, the Missouri Court contacted the Jefferson County District Court, and advised the Court of the existence of the Missouri court orders awarding custody of the child to his natural mother. Subsequently the Jefferson County District Court declined to exercise jurisdiction, dismissed the Petition, and entered a writ of habeas corpus ordering Petitioners to return the child to his mother. The trial court further allowed the Petitioners 30 days to file any motion for post trial relief, including any motions to reconsider. Petitioners instead filed with this Court pursuant to C.A.R. 21 a Petition for Rule to Show Cause. In that Petition, Petitioners failed to provide this

Court with a complete chronology of the events that occurred in Missouri, and failed to provide the court with copies of all documents necessary for this Court to rule on the issues presented. In order to remedy this situation, a complete chronology of this case is provided below.

Attached in the Appendix filed with this Response are all documents filed in the Circuit Court for St. Charles County Missouri as well as all agreements entered into between the parties.

CHRONOLOGY OF EVENTS

1. On April 18, 2003, Respondent C.M.C. gave birth to Minor Child at St. John's Hospital in St. Louis Missouri.

2. Adoption proceedings were commenced by Petitioners in the Circuit Court of St. Charles County Missouri, Cause Number JU103-108A.

3. On April 19, 2003, Respondent C.M.C. signed a Transfer of Temporary Custody and Appointment of Power of Attorney for the care of the child in favor of Petitioners. The document was filed with Circuit Court of St. Charles County on April 21, 2003. (Exhibit A) The transfer provided that C.M.C. could change her mind prior to the court's acceptance of her consent to termination of parental rights and adoption, and that if she did change her mind, she would reimburse petitioners $20 per day for every day the child was with them.

4. On April 21, 2003, Respondent C.M.C. signed a Consent to Termination of Parental Rights and Consent to Adoption which was filed with the Circuit Court of St. Charles County, Missouri on April 21, 2003. (Exhibit B)

5. On April 21, 2003, Petitioners filed in the Circuit Court for St. Charles County, Missouri, both a Petition for Termination of Parental Rights and Transfer of Legal Custody and Petition for Adoption and a Motion for an Emergency Order of Transfer of Legal Custody. (Exhibits C and D)

6. On April 21, 2003, the Circuit Court of St. Charles County signed an Order Placing the Minor Child with the Prospective Adoptive Parents upon Signing of Order. Pursuant to the terms of the Order, the Circuit Court of St. Charles County stated that it "retains jurisdiction in this matter for a formal hearing of termination of parental rights, transfer of legal custody and petition for adoption." (Exhibit E)

7. On or about April 21, 2003, Petitioners signed a document entitled "Legally at Risk Placement." A copy of that document is included in the Appendix as Exhibit F. Pursuant to the terms of the document, the Petitioners acknowledged that the placement of the child with them was legally at risk until termination of parental rights occurred. They further agreed that "[i]n the event that termination of parental rights does not occur, than prospective adoptive parents agree to return the child to the intermediary." This document was filed with the Circuit Court on April 21, 2003.

8. On May 15, 2003, the Circuit Court entered an Order stating that "the Consent to Termination of Parental Rights and Consent to Adoption executed by the birth mother . . . is not approved." (Exhibit G)

9. On July 25, 2003 Respondent, in accordance with Mo. Rev. Stat. §453.030(7), which provides that consent to termination and adoption may be withdrawn anytime

prior to the consent being accepted by the Court, filed a Motion to Withdraw and Revoke Consent to Adoption. (Exhibit H)

10. On August 22, 2003, the Circuit Court of St. Charles County entered a Judgment and Order granting Respondent's motion to withdraw consent to termination of parental rights and consent to adoption. (Exhibit I)

11. On September 10, 2003, Respondent filed a Response to the Petition for Adoption filed by Petitioners. (Exhibit J)

12. On September 26, 2003, Respondent filed a Motion to Dismiss the Petition for Adoption requesting that the adoption proceedings be dismissed and custody of the minor child be returned to her. In Support of that Motion they filed a memorandum of law. (Exhibits K and L)

13. On October 15, 2003, the Circuit Court issued a Judgment of Dismissal of Petition for Adoption granting Respondent's motion for dismissal and ordering that physical custody of the minor child be returned to the natural mother. (Exhibit M) Pursuant to Colorado Law, this order is a custody decree. *In re Custody of KR.*, 897 P.2d 896 (Colo. App. 1995).

14. On November 3, 2003, Petitioners filed with Circuit Court For St. Charles County a Motion to Vacate Judgment. (Exhibit N)

15. On December 5, 2003, a hearing was held on Petitioner's Motion to Vacate and on January 2, 2004, the Circuit Court for St. Charles County denied the Motion to Vacate Judgment finding that consent to terminate had been withdrawn and further finding that the Respondent did not abandon the child. The finding that Respondent did not abandon her child was based upon the Transfer of

Temporary Custody and Appointment of Power of Attorney document executed by Respondent (Exhibit "A"), which specifically provides that Respondent may change her mind and wish to take back physical custody of her child and further provides that if she does so, she will reimburse Petitioners in the amount of $20 for every day the child is in their care. (Exhibit P)

16. Petitioners filed a Notice of Appeal with the Missouri Court of Appeals and filed with the Circuit Court a Motion to Set Supersedeas Bond. (Exhibits Q) Mother filed an objection to the Motion. (Exhibit R) The Motion to set Supersedeas Bond was denied.

17. On October 31, 2003, two weeks after the Circuit Court for St. Charles County, Missouri had ordered that physical custody of the minor child be returned to Respondent, and four days before the Petitioners filed in Missouri a Motion to Vacate the Order awarding Respondent Custody, Petitioners filed in the District Court Jefferson County, Colorado, a Verified Petition for Allocation of Parental Responsibilities. (Exhibit S) The Petitioners failed to attach to their pleading all pleadings and relevant documents filed with the Circuit Court for St. Charles County, Missouri, thus presenting to the District Court an incomplete picture of what transpired in Missouri.

18. On November 3, 2003, Respondent filed in the Jefferson County District Court a Petition for Writ of Habeas Corpus, requesting that the child immediately be returned to Respondent. (Exhibit T)

19. On December 3, 2003, Respondent filed an Answer to the Verified Petition and filed a Motion to Dismiss the Petition. (Exhibits U and V)

20. On December 23, 2003, Petitioners filed a Motion for Extension of Time to Respond to Petition for Writ of Habeas Corpus. (Exhibit W)

21. On January 3, 2003, the District Court for Jefferson County entered a Writ of Habeas Corpus Ordering Petitioners to immediately return the minor child to Respondent or her representative. On that same day, the District Court entered an order *nunc pro tunc* to December 4, 2003, dismissed Petitioner's Verified Petition for Allocation of Parental Responsibilities, finding that the Circuit Court for Missouri had previously entered an order awarding Respondent custody of the minor child and because Missouri retained continuing and exclusive jurisdiction over the matter, the District Court did not have jurisdiction in this matter. (Exhibits X and Y.)

22. On January 8, 2003, the Petitioners filed a Response to the Motion to Dismiss and Petition for Writ of Habeas Corpus or in the Alternative for Post-Trial Relief. Petitioners did not present in that Response/Motion any factual or legal arguments. (Exhibit Z)

23. On January 13, 2003, the District Court entered an Order reaffirming its prior rulings and denying Petitioner's request that it reconsider its granting of the Writ of Habeas Corpus and dismissing the Petition for Allocation of Parental Rights. The District Court granted Petitioners 30 days to file any motions to reconsider or for post-trial relief (Exhibit AA)

24. Petitioners then filed with this Court a C.A.R. 21 Petition. Attached to that Petition were eleven of the 27 documents attached to this Response.

I. THE MISSOURI COURTS HAVE PROPERLY EXERCISED CONTINUING JURISDICTION OVER THIS ADOPTION LITIGATION.

In their Verified Petition for Allocation of Parental Rights, Petitioners allege that no other state has jurisdiction over this matter. *See* Exhibit S p. 2, para. 2. This allegation is patently false. Missouri courts have jurisdiction over this matter, for at least the following reasons: (1) This litigation is essentially a continuation of an adoption proceeding that was filed in the Missouri courts, (2) Missouri courts exercised jurisdiction by entering orders for temporary placement, by assuming jurisdiction over the adoption petition, and by explicitly stating in its court orders that Missouri courts would retain jurisdiction, (3) Petitioners invoked the jurisdiction of the Missouri courts and consented to said jurisdiction – at least until they were unsuccessful in getting the result they wanted, (4) the Interstate Compact of the Placement of Children (ICPC) and the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), applied to this case, establish jurisdiction in Missouri, and (5) the Uniform Dissolution of Marriage Act does not apply to this case so as to deprive the Missouri courts of jurisdiction and, in fact, supports the actions of the Jefferson County District Court in this case.

(1) This litigation is essentially a continuation of an adoption proceeding that was filed in the Missouri courts.

The actions in Missouri and Colorado are essentially the same: the parties are the same, the minor child is the same, and the relief requested is almost the same. In Missouri, the petitioners asked the courts to terminate the

parental rights of the child's mother and father, and to give Petitioners custody of the child; in Colorado, they drop their request to terminate the natural parents' rights, but continue to press for custody of the child. There is no material difference in the parties or the relief requested. The only difference is that the petitioners lost there and hoped they would prevail here, and they have found some additional grounds in the Colorado statute that they hope to apply to the litigation they already lost in Missouri.

Colorado Courts have stated on more than one occasion that ***adoption proceedings are custody proceedings.*** *In re Marriage of Dickson*, 983 P.2d 44 (Colo. App. 1998) ("[A] claim for nullification of adoption is in the nature of a custody proceeding."); *In re Custody of K.R.*, 897 P.2d 896 (Colo. App. 1995). Prior to filing of the Petition for Allocation of Parental Responsibilities in the Jefferson County District Court, the Circuit Court for St. Charles County, Missouri had dismissed Petitioners' Petition for Adoption and had awarded custody of the child to Respondent. Missouri had already made a final custody determination. Pursuant to *Marworth Inc v. McGuire,* 810 P.2d 653 (Colo. 1991), a final judgment of one state must be given full faith and credit in every other state. *See* U.S. Const. Art. IV Sec. I. *(cited with approval in IRM Dickson, supra.)* This fundamental constitutional principle is reflected in C.R.S. §14-13-203, which states that a court of this state may not modify a custody determination of another state unless the court has jurisdiction to enter an initial custody determination **and** the other state no longer has jurisdiction or has declined to exercise that jurisdiction. Missouri has jurisdiction over this matter and has continued to exercise that jurisdiction.

(2) Missouri courts exercised jurisdiction by entering orders for temporary placement, by assuming jurisdiction over the adoption petition, and by explicitly stating in its court orders that Missouri courts would retain jurisdiction.

On April 21, 2003, Missouri entered an order granting temporary custody of the child to Petitioners. (Exhibit E) In that order, the court specifically provided that it was retaining jurisdiction over this matter. On October 15, 2003, Missouri entered an order dismissing the petition for adoption and restored custody of the child to the Respondent (Exhibit L). On January 2, 2004, the Missouri Court denied Petitioners' motion to vacate its prior order this reaffirming its prior custody order. (Exhibit P) As these documents demonstrate, Missouri has exercised jurisdiction in this matter as recently as four weeks ago. Jurisdiction was proper in Missouri when the adoption proceeding was commenced by Petitioners, and pursuant to both the Missouri court orders, and the Interstate Compact on the Placement of Children, *see discussion, infra,* which has been adopted both by Colorado and Missouri, jurisdiction over the child remained with Missouri until such time as the adoption was finalized or the child reaches the age of eighteen. Missouri therefore had jurisdiction to enter the order restoring custody to the natural mother.

(3) Petitioners invoked the jurisdiction of the Missouri courts and consented to said jurisdiction.

Petitioners are estopped from arguing that the Missouri courts do not have jurisdiction over the adoption litigation. Although Petitioners do not acknowledge it, they were the ones who initiated the adoption proceedings

in Missouri and thus invoked the jurisdiction of the Missouri Courts. Now they are trying to "un-invoke" that jurisdiction. They simply cannot do that. Once they availed themselves of Missouri's jurisdiction in order to obtain temporary custody of the child, they agreed to abide by the Missouri Court's Orders, including the provision in the temporary custody order that stated in no uncertain terms that the Circuit Court for St. Charles County, Missouri retained jurisdiction over the matter. They cannot now complain that the court that temporarily placed the child with them and specifically retained jurisdiction, lost jurisdiction once the Petitioners removed the child from the state.

(4) The Interstate Compact of the Placement of Children (ICPC), and the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), as applied to this case, establish jurisdiction in Missouri.

Colorado has joined the Interstate Compact of the Placement of Children (ICPC), which states in no uncertain terms in Article I:

> It is the purpose and policy of the party states to cooperate with each other in the interstate placement of children to the end that: (d) appropriate jurisdictional arrangements for the care of the children will be promoted.

C.R.S. §24-60-1802, Art. I. Under Article V of the Compact,

> The sending agency shall retain jurisdiction over the child sufficient to determine all matters in relation to the custody, supervision, care, treatment and disposition of the child which it would have had if the child had remained in the sending

> agency's state, until the child is adopted, reaches majority, becomes self-supporting or is discharged with the concurrence of the appropriate authority in the receiving state. Such jurisdiction shall also include the power to effect or cause the return of the child or its transfer to another location and custody pursuant to law.

See Department of Social Services of City and County of Denver v. District Court of the Eighteenth Judicial Dist., 742 P.2d 339, 342 (Colo 1987)(The language of the Interstate Compact clearly states that the sending agency retains jurisdiction until the child is adopted.) A "sending agency" is defined in § 24-60-1802 Art. II (d) as

> a party state, officer or employee thereof; a subdivision of a party state, or officer or employee thereof; a court of a party state; a person, corporation, association, charitable agency, or other entity which sends, brings, or causes to be sent or brought any child to another party state.

The majority of states that have addressed the issue have concluded that "sending agency" includes the natural parent. *In re Adoption No. 10087 in Circuit Court for Montgomery County,* 597 A.2d 456, 461-462 (Md. 1991); *In re Baby Girl,* 850 SW. 2d 64 (Mo. 1993); *In re Adoption of C.L.W.,* 467 So.2d 1106 (Fla.App.2 Dist 1985); *In re Adoption of T..M.M,* 186 Mont. 460, 608 P.2d 130, 132 (1980); *In the Matter of the Adoption of Baby Boy M.G.,* 135 Misc.2d 252, 515 N.Y.S.2d 198, 199-200 (N.Y. Sur.1987); *In the Matter of the Adoption of Calynn, M. G.,* 137 Misc.2d 1005, 523 N.Y.S.2d 729, 730-731 (N.Y. Sur.1987); *Matter of Adoption of A.M.M.,* 949 P.2d 1155 (Kan. App. 1997).

Under the ICPC, Missouri retains jurisdiction over the child until such time as the child is adopted. Missouri

therefore had jurisdiction to enter the order granting custody and pursuant to C.R.S. § 14-10-13-303, the District Court had a duty to accept that decree as binding.

(5) The Uniform Dissolution of Marriage Act does not apply to this case so as to deprive the Missouri courts of jurisdiction.

Petitioners claim that Section 123 of the Uniform Dissolution of Marriage Act gives Colorado jurisdiction over this adoption litigation and requires this Court to issue its extraordinary writ and order the district court to assert jurisdiction over this case. Petitioners' reliance upon C.R.S. § 14-10-123(1) is misplaced. While C.R.S.§ 14-10-123 provides that the district court has subject matter jurisdiction over petitions for allocation of parental responsibilities, it does not address the situation where a foreign state has already entered a custody order in an adoption case, prior to the filing in Colorado of a petition for allocation of parental responsibilities. Nor does it address the situation where the child is in Colorado pursuant to the Interstate Compact of the Placement of Children (ICPC). In that situation, C.R.S. §14-10-123(1) must be read in conjunction with both the jurisdictional requirements of the UCCJEA (C.R.S. §14-13-101 et seq.) as well as the jurisdictional requirements of the ICPC (C.R.S. §24-60-1801 et seq.).

Adoption proceedings of foreign states that determine custody of the minor child are custody decrees to which UCCJEA applies. *In re Custody of K.R., supra.* A foreign court order dismissing a petition for adoption and providing that custody be returned to the biological mother is a custody determination. *See* §14-13-303. As a result the

courts of this state are required to enforce that decree unless a court of this state has jurisdiction to modify that decree. The Jefferson County District Court did not have jurisdiction to modify the Missouri decree and therefore acted properly in dismissing the petition, and ordering that the child be returned to his mother.

Petitioners' reliance on *In the Matter of Custody of C. C.R.S.*, 892 P.2d 246 (Colo. 1995) is misplaced. *C.C.R.S.* addressed the rights of prospective adoptive parents and the birth mother, however, both parties in that case resided in Colorado and, moreover, there had been no prior adjudication regarding custody. The Court held that prospective adoptive parents had standing in a custody dispute concerning the child. The issue here is not whether the Petitioners have standing, but rather, whether under the circumstances of this case, a Colorado District Court should exercise jurisdiction over the custody dispute. *See In re Marriage of Tonnessen,* 937 P.2d 863 (Colo App. 1996)("The question whether jurisdiction exists is distinct from the question whether jurisdiction should be exercised. *McCarron v. District Court,* 671 P.2d 953 (Colo.1983); *Johnson v. District Court,* 654 P.2d 827 (Colo.1982)."). As the Colorado Court of Appeals has explained,

> Subject matter jurisdiction concerns the court's authority to deal with the class of cases in which it renders judgment. *In re Marriage of Stroud,* 631 P.2d 168, 170-71 (Colo.1981). A court has jurisdiction of the subject matter if the case is one of the types of cases that the court has been empowered to entertain by the sovereign from which the court derives its authority. *Paine, Webber, Jackson & Curtis, Inc. v. Adams,* 718 P.2d 508 (Colo.1986); *Williamson v. Williamson,* 39

> P.3d 1199 (Colo.App.2001). However, it is not sufficient that the court has, in the abstract, the authority to decide the particular class of case that is before it. The court's authority must be properly invoked before it can act. *In re Marriage of Stroud, supra.*

In re Marriage of Orr, 36 P.3d 194 (Colo. App. 2001).

The issue before this Court is not whether Petitioners have standing or whether the best interest of the child standard should apply. The issue is whether the district court had jurisdiction, and if it did have jurisdiction, whether it abused its discretion in deciding not to exercise the jurisdiction it might have. *See L.G. v. People*, 890 P.2d 647 (Colo. 1995). A Court must apply a two-part test in determining if jurisdiction exists. The first question is whether the court does have jurisdiction. If it is determined that the court does have jurisdiction, the court must then determine if it should exercise that jurisdiction. The burden of proof is on the party claiming jurisdiction. *See Clark v. Kendrick,* 670 P.2d 32 (Colo. App. 1983). The issue of jurisdiction can be decided solely on the pleadings. *Id.*

The Petitioners argue that the fact that an adoption action was filed in Missouri prior to the filing of the Petition for Allocation of Parental Rights in Colorado is of no weight. They contend that because Colorado is the child's home state, then pursuant to C.R.S. §14-13-201, Colorado has jurisdiction to make an initial custody jurisdiction. (Petition at p. 7) What this argument ignores, however, is that an initial custody determination has already been made. *(See* Exhibits M and P). The applicable provision, therefore, is C.R.S. §14-13-203, and because Missouri has retained jurisdiction over this matter, and because the Petitioners have invoked the jurisdiction of

that state, Colorado does not have jurisdiction to modify the Missouri custody decree.

The Petitioners argue that because C.R.S. § 14-13-103 states that the UCCJEA does not apply to adoption proceedings, therefore the order entered by the Missouri Court dismissing the adoption proceeding and awarding custody of the child to Respondent is not a custody order, and therefore jurisdiction is proper in Colorado. The question is not whether the UCCJEA applies to the Missouri proceeding, rather, the question is whether the act applies to the Petition for Allocation of Parental Rights filed by Petitioners in the Jefferson County District Court. The action filed by the Petitioners is neither an adoption proceeding nor is it an "proceeding pertaining to the authorization of emergency medical care for the child." Therefore C.R.S. § 14-13-103 is inapplicable. The action filed by the Petitioners is a child custody proceeding as that term is defined in C.R.S. §14-13-102(4). The UCCJEA is applicable. While arguably the UCCJEA does not apply to the Missouri proceeding, the ICPC certainly does, and pursuant to Article V of the Compact, Missouri has jurisdiction.

The Petitioners argue that even if the UCCJEA does apply, this Court is free to ignore the provisions of that act because Missouri does not have jurisdiction of the child under the act and therefore the Missouri order is not deserving of full faith and credit. This "doublespeak" simply confuses the issues. As stated above, the Missouri proceeding is governed by the provisions of the ICPC and the Colorado proceeding is governed by the UCCJEA. When this is done, there is no conflict as to which state has jurisdiction – Missouri has jurisdiction under the ICPC and Colorado does not have jurisdiction under the

UCCJEA. This is not a case where there are competing adoption proceedings – there was but one adoption proceeding and that was filed in Missouri.

The facts of *In re the Custody of K.R., supra,* are identical to the facts of this case. In that case, a petition for adoption had been filed in California by prospective adoptive parents who were residents of Colorado. The birth mother withdrew her consent to the adoption and the California Court dismissed the adoption petition and awarded custody of the child to the birth mother. Prospective adoptive parents then filed a petition for custody in the Colorado Courts.

The Colorado District Court dismissed the petition finding that it lacked jurisdiction. The Court of Appeals affirmed that dismissal. The Court rejected the prospective adoptive parent's argument that the California order that dismissed the adoption proceeding was not a custody decree. *K.R.*, 897 P.2d at 899. The Court found that *C.C.R.S., supra,* is not controlling as it did not address the issues presented. *K.R.* 897 P.2d at 900. In *G.B. v. Arapahoe County Court,* 890 P.2d 1153 (Colo. 1995), this Court defined a custody determination as "a court order providing for the custody of a child." *G.B. v. Arapahoe County Court,* 890 P.2d at 1157. Relying upon that definition, the Court held that because the California order "provided that the custody of the child be returned to the biological mother," it was a custody determination, and therefore the provision of the UCCJEA did apply. *K.R.*, 897 P.2d at 900. Because the UCCJEA applied, Colorado could not modify the California Custody Decree unless California had lost or declined to exercise jurisdiction over the matter. The current version of the UCCJEA in effect in Colorado reaffirms the Court of Appeals' holding in *K.R.* C.R.S. §14-13-203 limits

the jurisdiction of Colorado Courts to modify a custody determination of another state to situations where the foreign jurisdiction "no longer has exclusive, continuing jurisdiction under a provision of law adopted by that state that is in substantial conformity with section 14-13-202 . . . or the child, the child's parents and any person acting as a parent do not presently reside in the other state."

The Missouri Court order provides that the Missouri Court "retains jurisdiction in this matter for a formal hearing of termination of parental rights, transfer of legal custody and petition for adoption." (Exhibit E). Furthermore, the child's parents continue to reside in Missouri.

Therefore, under *In re Custody of K.R.*, the Missouri order dismissing the adoption and awarding custody to Respondent is a custody decree, and pursuant to C.R.S. §14-13-203 and 14-13-303, the Colorado Courts do not have jurisdiction to modify the decree and are further under an obligation to enforce that decree.

II. THE JEFFERSON COUNTY DISTRICT COURT DID NOT ABUSE ITS DISCRETION, ACT OUTSIDE OF ITS JURISDICTION, OR TAKE ANY OTHER ACTION THAT WARRANTS ISSUANCE OF AN EXTRAORDINARY WRIT.

Notwithstanding the arguments herein that Missouri, not Colorado, has exclusive jurisdiction over this dispute, Respondents offers another reason that this Court should reject the Petitioners' request for extraordinary relief under C.A.R. 21: the rulings and actions of the Jefferson County Court were well within its discretion and not grounds for this Court's intervention on an extraordinary writ. Petitioners make a variety of allegations of error by

the Jefferson County District Court, and none of those allegations have merit. Contrary to the Petitioners' contention, the trial court did not abuse its discretion in dismissing their Petition and in ordering that the Missouri Court Order be given full faith and credit and that the Petitioners immediately return the child to Respondent or her intermediary.

1. The Jefferson County District Court acted well within its discretion in declining to exercise any jurisdiction it may have had.

Even if this Court were to rule that the Jefferson County District Court had jurisdiction, that would not automatically entitle the Petitioners to relief. It was within the trial court's discretion not to exercise its jurisdiction. *See L. G. v. People,* 890 P.2d 647 (Colo. 1995)(Even if court does have jurisdiction, it must determine whether it should exercise that jurisdiction.) To prevail, Petitioners must show that not only *could* the district court take the case, but that it had to do so. Because the trial court did not exceed its jurisdiction in dismissing the petition, the issue before this Court is whether the trial court abused its discretion. A trial court abuses its discretion only when its ruling is manifestly arbitrary or unreasonable. *See Boettcher & Co., Inc. v. Munson,* 854 P.2d 199, 211 (Colo.1993). The trial court's decision here was neither.

Petitioners' reliance on *Pearson v. District Court*, 924 P.2d 512 (Colo. 1996) is misplaced. At issue in *Pearson* was whether a particular statute precluded the trial court from ruling as it did. Therefore the issue was not whether the trial court abused its discretion but whether the trial court exceeded its authority. Here, Petitioners point to no statute that the district court violated, and they show no

abuse of discretion. The Jefferson County District Court was not manifestly arbitrary or unreasonable in rejecting the Petitioners' attempts to persuade it to alter a Missouri Court order.

2. The trial judge's private telephone conference with the Missouri judge is not grounds for extraordinary relief.

Petitioners want this Court to rule that, when the Jefferson County District Judge accepted the telephone call from the Missouri Judge and learned of the existence of a Missouri Court order, the Jefferson County District Judge did something that warrants issuance of an extraordinary writ. However, the district judge acted well within his authority under Subsection (3) of Section 110 of the UCCJEA, C.R.S. §14-13-110(3). Communication between courts about court records may occur without informing the parties. Section 110 provides:

> (1) A court of this state may communicate with a court in another state concerning a proceeding arising under this article.
>
> (2) The court may allow the parties to participate in the communication. If the parties are not able to participate in the communication, they must be given the opportunity to present facts and legal arguments before a decision on jurisdiction is made.
>
> **(3) Communication between courts on schedules, calendars, court records, and similar matters may occur without informing the parties. A record need not be made of the communication.**

> (4) Except as otherwise provided in subsection (3) of this section, a record must be made of a communication under this section. The parties must be informed promptly of the communication and granted access to the record.
>
> (5) For the purposes of this section, "record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

C.R.S. §14-13-110 (emphasis added). Because the communication was limited to whether in fact the Missouri Court had entered an order dismissing the Missouri Petition for Adoption and awarding custody to Respondent-mother, the telephone conversation was governed by Subsection (3). The Jefferson County District Judge was under no obligation to permit any parties to participate in the telephone conversation; nor was he obligated to make a record of the communication. Petitioners had no right to present facts and legal arguments. Only if the communication involved substantive matters would C.R.S. 14-13-110(2) be implicated. *See In re Simons,* 693 N.E.2d 1111, 1118 (Ohio App. 2 Dist. 1997) ("communications regarding the status of other pending cases are essential to the fulfillment of the purposes of the UCCJA . . . . . where there is no evidence that the trial judges exchanged evidence or conducted communications regarding the substantive issues of the pending cases, we cannot say there is a violation of any party's due process rights.). Petitioners herein have not alleged or submitted any supporting affidavits in this Court that allege that the two judges discussed anything other than material covered by Subsection (3). There is no basis for this Court to issue its writ because of the Missouri judge's telephone call to the Jefferson County District Court judge.

Nor do Petitioners state a claim under Subsection (2) of Section 110. Subsection (2) does not forbid private telephone calls between judges; it provides permissive authority for a district judge, within exercise of his discretion, to permit or to not permit parties to participate in a telephone call, even when the telephone conversation involves matters not covered in Subsection (3). Therefore, even if Petitioners had claimed or proven that the conversation covered matters other than those identified in Subsection (3), there is no automatic statutory right to have participated in such telephone conversations. When judges discuss matters not covered by Subsection (3), there are only three further requirements: making of a record of the communication, informing the parties, and permitting the parties to "present facts and legal arguments before a decision on jurisdiction is made." C.R.S. § 14-13-110(2).

Even if Petitioners had alleged and proven a violation of Section 110 of the UCCJEA, they still do not establish grounds for extraordinary relief, because they are not prejudiced by any technical omission and any error was harmless. As argued, *supra,* the Missouri courts have jurisdiction over this matter, and the Jefferson County district judge was well within his discretion to decline to intervene in the orders and procedures of the Missouri court system. The Petitioners presented whatever facts and legal arguments they wished to present to the district court in their Motion to Reconsider, and they have presented those "facts" and legal arguments in their petition in this Court. Further, the district court gave Petitioners thirty additional days to present anything else they wished, and they elected to not do so.

3. The trial judge's refusal to hold an evidentiary hearing prior to dismissing the case is not grounds for extraordinary relief.

Petitioners offer two reasons that this Court should issue its writ based upon the refusal of the Jefferson County District Court to hold a hearing before dismissing their Petition. They claim that his actions violate C.R.S. § 14-13-110(2), *see* discussion, *supra,* and they claim that his actions violate their "due process" rights. Petitioners are wrong because (1) C.R.S. § 14-13-110(2) does not require an evidentiary hearing, and (2) they have no due process right to continue to keep the child from his mother.

Regarding Petitioners' claims under C.R.S. § 14-13-110(2), the above analysis about the telephone call also applies to their desire for an evidentiary hearing. They can show no prejudice whatsoever, as their claim to exclusive jurisdiction in Colorado has no merit whatsoever. Even if the court did err in not providing opportunity for party to present facts and legal argument, Petitioners must show that they were harmed by this procedural error. *See In re Custody A.N.W.,* 798 N.E.2d 556 (Ind. App. 2003). Petitioners have failed to show that the trial court's ruling would have been different if they had been provided the opportunity to make legal arguments and present facts. The pleadings on file in this matter speak for themselves, and from those pleadings it is clear that Missouri has retained jurisdiction over this matter.

Further, Subsection (2) does not require an evidentiary hearing, it requires only an opportunity to present facts and legal arguments *when matters other than those covered by Subsection (3)* are discussed by judges on the telephone. Petitioners provided to the district court their "facts and legal arguments," in the form of their Motion for

Reconsideration, and they have presented those same facts and arguments here.

As for the Petitioners' vague due process claim, it is addressed in this Response, *infra,* in the discussion of Full Faith and Credit.

It is apparent from a review of all the relevant material that the Petitioners are not only wrong about jurisdiction, they are attempting to abuse court process to avoid lawful orders entered by the Missouri courts, and to avoid their own contractual agreements. The Petitioners are wrong about their underlying claims, and this Court should not delay return of the child to its mother one day longer based on the specious claim that there should be further hearings in the Colorado courts.

4. Petitioners' argument that the lack of formal registration under § 14-13-305 deprives Missouri of jurisdiction, or compels a different result in the district court, is without any sound basis in law, because they had full notice of the relevant court orders and fully participated in the litigation that resulted in the orders.

Petitioners further argue that the failure of Respondent to perfect registration of the Missouri Custody Decree prevents her from enforcing that decree. A review of the registration provisions in C.R.S. §14-13-305 demonstrates that the registration "requirements" were intended to apply to a situation where a party who was awarded custody in a foreign state sought by a separate action to enforce that decree. This is not what happened here. Almost immediately after the custody decree was entered by the Missouri Court, with full participation by the

Petitioners, the Petitioners filed a proceeding in the Jefferson County District Court requesting that the court either ignore that decree or modify it. The Petitioners had notice of the decree, and by initiating the proceedings in this State, were contesting the validity of that decree. Thus the purpose of the procedures set forth in C.R.S.§ 14-13-305 have been met, and Petitioners' objection to the form of the writ, and the failure to register the foreign decree elevates form over substance. *See Frohlick Crane Service v. Mack,* 182 Colo. 34, 37, 510 P.2d 891, 892 (1973) (If a definition elevates form over substance thus overriding clear legislative intent, it will not be followed). Further, petitioners here are the same as in Missouri. They not only had full notice of the Missouri court orders, they participated fully in the litigation there.

5. The form of the District Court order in this case does not compel a different result and certainly does not justify issuance of an extraordinary writ.

Petitioners argue that because Writs of Habeas Corpus have been abolished, the district court was without power to enter a writ ordering the return of the child. In *In re People ex rel. B.C.,* 981 P.2d 145, 149 (Colo. 1999) this Court held that "Rule 106 only abolished the remedial writs in the sense that it abolished the technical pleading requirements of the writs that existed before the rule was promulgated." C.R.C.P. 106 is not to be read so as to "abrogate the authority vested in district courts, previously under the common law and currently by statute, to grant [the appropriate] writ." *Id. See also People ex rel. Mijares v. Kniss,* 144 Colo, 551, 553, 357 P.2d 352, 353 (1960):

> '[e]ven under the Rules of Civil Procedure the ***substantive aspects*** of remedial writs are preserved, and relief of the same nature as was formerly provided in such proceedings may be granted in accordance with precedents established under the old practice.' (Emphasis supplied.) *Leonhart v. District Court,* 138 Colo. 1, 329 P.2d 781, 783; *Hall v. City and County of Denver,* 117 Colo. 508, 190 P.2d 122; *North Poudre Irr. Co. v. Hinderlider,* 112 Colo. 467, 150 P.2d 304.

C.R.S. §14-13-303(1) requires that "a court of this state . . . recognize and enforce a child custody determination of another state." C.R.S. §14-13-303(2) provides that "a court of this state may utilize any remedy available under other law of this state to enforce a child custody determination of another state." Because the "substantive aspects" of remedial writs have not been abolished, it was not improper for the district court enter a writ of habeas corpus ordering Petitioners to immediately return the child to Respondent or her intermediary.

III. THE PETITIONERS HAVE FAILED TO SHOW THAT THEY HAVE NO ADEQUATE REMEDY AT LAW, AND ANY SUCH CLAIM MUST BE ADDRESSED TO THE MISSOURI COURTS.

Petitioners' final contention is that they cannot obtain appropriate relief through the appellate process. In essence their argument is that if the Missouri Court Order is given full faith and credit and properly enforced, it would result in the child being removed from them, thus causing them irreparable harm. The problem with this argument, to the extent they make it, is that they have not raised in the Missouri courts the claim that Missouri has no jurisdiction.

They have rights to process and appeals in Missouri and, indeed, have availed themselves of those procedures. They fail to show any inadequate remedy at law.

IV. THE MISSOURI COURT ORDER IS ENTITLED TO FULL FAITH AND CREDIT.

Missouri had already made an initial custody determination. Pursuant to U.S. Const. Art. IV Sec. 1, a final judgment of one state must be given full faith and credit in every other state. *See Marworth Inc v. McGuire,* 810 P.2d 653 (Colo. 1991); *IRM Dickson, supra.* This fundamental constitutional principle is reflected in C.R.S. § 14-13-203. The manipulative behavior of the Petitioners in this case is a textbook illustration of the importance of the principles underlying the Full Faith and Credit Clause.

A hearing was held in Missouri prior to the dismissal of the Petition for Adoption and the entry of judgment awarding custody of the child to the Respondent. Under Missouri law, in an adoption proceeding, consent of the natural parent is jurisdictional, and if the natural parent objects to the adoption and if willful abandonment or neglect is not proven, the court will not reach the question of whether the adoptive parents are fit or what is in the best interest of the child. *See In re M.F.,* 1 S.W.3d 524 (Mo. App. W.D. 1999); *In Re Adoption of K.A.S.*, 933 S.W.2d 942 (Mo. App. W.D. 1996). After hearing arguments of counsel, and after allowing the parties to brief the issues, the court entered a ruling finding that the consent to terminate parental rights was revoked and that Respondent had not abandoned the child. Thus contrary to the Petitioners' claim, they were afforded a hearing in Missouri, and the court simply ruled against them.

Petitioners' argument that the Courts of this State are not obligated to give full faith and credit to the Missouri Court order because they have been deprived of "due process of law," is unavailing, and is simply an attempt to circumvent a valid court order from another state. While the 14th Amendment and Colo. Const. Art. II §25 provide protection against arbitrary governmental infringements and restrictions on liberty interests,[1] neither constitutional provision is implicated if the party does not have a constitutionally-protected liberty interest. *Watso v. Colorado Department of Social Services*, 841 P.2d 299 (Colo. 1992); *People in the Interest of A.M.D.*, 648 P.2d 625 (Colo. 1982); *People in the Interest of A.W.R.*, 17 P.3d 192 (Colo. App. 2000). In the context of foster parents, the Court of Appeals has held that in determining if a constitutionally-protected liberty interest exists, the question is whether the foster parents have a realistic expectation of the continuation of the foster-parent/foster-child relationship. Because no realistic expectation existed, there is no constitutionally-protected liberty interest and the Petitioners are not entitled to the procedural protection of the due process clause of the federal or state constitution. *People in the interest of A.W.R., supra.*

The Petitioners voluntarily signed a document acknowledging that the placement of the child with them was "legally at risk," and further agreeing that in "the event that termination of parental rights does not occur, [they] agree to return the child to the intermediary." (Exhibit F) Until such time as the termination of Respondent's parental rights occurred, Petitioners had no realistic

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[1] *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Watso v. Colorado Department of Social Services*, 841 P.2d 299 (Colo. 1992).

expectation of the continuation of that relationship. In addition, the Transfer of Temporary Custody document signed by Respondent stated that Respondent may change her mind regarding the transfer of custody of her child prior to her consent to termination of parental rights and adoption being accepted by the court.

The majority of courts have found that foster parents do not have a protected liberty interest, *Rodriguez v. McLaughlin,* 214 F.3d 328 (2nd Cir. 2000), *cert. denied,* 532 U.S. 1051 (2001) (prior to finalization of adoption no liberty interest exists); *Procopio v. Johnson,* 994 F.2d 325 (7th Cir. 1993) (no liberty interest); *Renfro v. Cuyahoga County Department of Human Services,* 884 F.2d 943 (6th Cir. 1989); *Kyees v. County Department of Public Welfare of Tippecanoe County,* 600 F.2d 693 (7th Cir.1979); *Drummond v. Fulton County Depart. of Family & Children's Services,* 563 F.2d 1200 (5th Cir.1977); *Johnson v. Burnett,* 182 Ill.App.3d 574, 538 N.E.2d 892 (1989); *In Interests of A.C.,* 415 N.W.2d 609 (Iowa 1987); *In re Adoption/Guardianship No. 2633,* 101 Md.App. 274, 646 A.2d 1036 (1994); *Adoption of a Minor,* 386 Mass. 741, 438 N.E.2d 38 (1982); *In re Dependency of J.H.,* 117 Wash.2d 460, 815 P.2d 1380 (1991); *Engstrom v. Iowa,* 461 N.W.2d 309, 319 (Iowa 1990) (Pre-adoptive parents did not have protected liberty interest in prefamilial relationship with child who was to be adopted, such that termination of adoption proceedings, upon discovery that child's natural father was alive, would be actionable under § 1983.) Because the Petitioners did not have a constitutionally-protected liberty interest, their claim that the Missouri Judgment awarding custody of the

child to his mother is not entitled to full faith and credit falls short.[2]

In contrast, Respondent does have a constitutionally-protected liberty interest in the care, custody and management of her child. *Santosky v. Kramer,* 455 U.S. 745 (1982); *B.B. v. People,* 785 P.2d 132 (Colo.1990); *People ex. rel. M.B.,* 70 P.3d 618 (Colo. App. 2003). In *Troxel v. Granville,* 530 U.S. 57, 65 (2000), the United Supreme Court held that "[t]he liberty interest . . . of parents in the care, custody, and control of their children [] is perhaps the oldest of the fundamental liberty interests recognized by this Court."

V. PETITIONERS ARE NOT ENTITLED TO EXTRAORDINARY RELIEF BECAUSE THEY COME TO THIS COURT WITH "UNCLEAN HANDS."

Petitioners claim that there is no adequate remedy at law and therefore they are entitled to equitable relief from this Court. Petitioners allege irreparable harm because the child has been with them for nine months. Petitioners, however, come to this Court with unclean hands and therefore are not entitled to invoke the equity powers of this Court. In *Salzman v. Bachrach,* 996 P.2d 1263 (Colo. 2000), this Court explained the doctrine:

> In Colorado, the clean hands maxim dictates that one who has engaged in improper conduct regarding the subject matter of the cause of action

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[2] For the same reason, their claim that the trial court erred in dismissing their petition without an evidentiary hearing also falls short. *See* discussion, *supra.*

> may, as a result, lose entitlement to an equitable remedy. *See Rhine v. Terry,* 111 *Colo.* 506, 508, 143 P.2d 684, 684 (1943). The clean hands doctrine is one of public policy, devised to protect the integrity of the court. *See id.* at 508, 143 P.2d at 685.

996 P.2d at 1269. The doctrine applies only when "the improper conduct [relates] directly to the underlying litigation. In other words, the inequitable conduct must have an immediate and necessary relation to the claims under which relief is sought." *Ajay Sports, Inc. v. Casazza,* 1 P.3d 267 (Colo.App.2000), *citing Nakahara v. NS 1991 American Trust,* 718 A.2d 518, 522 (Del.Ch.1998). Petitioners' conduct in this case in refusing to abide by terms of the agreement that they signed acknowledging that the placement was "legally at risk" and agreeing to return the child in the event the termination of parental rights did not occur, and their refusal to abide by the terms of a Missouri Court Order and seeking to circumvent the Missouri Court Order by filing in Colorado a legally and factually misleading Petition seeking allocation of parental rights while continuing to challenge in the Missouri courts the Missouri Court order can at best be characterized as improper.

On July 25, 2003, six months ago, the natural Mother filed with the Circuit Court for St. Charles County filed a Motion to Withdraw and Revoke Consent to Adoption. At that time, the child had been with the Petitioners for a period of three months. Missouri Law (Mo. St. 253.030(7)) specifically provides that a birth mother's written consent can be withdrawn anytime prior to the acceptance of the written consent by a judge. Petitioners had knowledge that the written consent had not been accepted by the

court at the time Respondent filed her Motion to Withdraw and Revoke Written Consent. The Petitioners, notwithstanding the fact that they had signed a document entitled "Legally at Risk Placement" wherein they agreed that they would return the child in the event that termination of parental rights did not occur, rather than returning the child, refused to do so and insisted on going forward with the Petition for Adoption in Missouri which they had initiated. When the Missouri Court ruled against them on October 15, 2003, three and one-half months ago, rather than obeying the Missouri Court order, the Petitioners continued to challenge that order by both filing proceedings in Colorado while at the same time requesting that the Missouri Court reconsider its ruling. Despite the fact that both the Missouri Courts and the Colorado District Court have ordered Petitioner to return the child, the Petitioners have refused to do so and have continued with litigation.

The child has remained in Petitioner's custody for an additional six months since they first were informed that Respondent had revoked her consent to termination of parental rights and adoption and for an additional three and one-half months since the Missouri Court first ordered them to return the child to his mother. Petitioners cannot rely on their refusal to abide by the terms of the agreement they previously signed and their refusal to obey valid court orders as justification for why no other adequate remedy is available. It is the Petitioners who have refused to allow the Respondent to establish a relationship with her child and any bond that might have been established is a direct result of the Petitioners' obstructionist and selfish behavior.

Two courts – the Circuit Court for St. Charles County Missouri, as well as the District Court for Jefferson County, Colorado – have ordered the Petitioners to immediately return the child to Respondent, the natural mother of the child, and they have refused to do so, thus preventing the natural mother and the child to establish a bond. Moreover, not only have the Petitioners refused to abide by the court orders of two states, they have also deliberately breached the terms of their agreement that they would immediately return the child to Respondent or her intermediary in the event that Respondent revoked her consent. Petitioners should not be allowed to benefit from their own misdeeds. What the Petitioners are requesting is that this Court stay a valid court order awarding custody of the minor child to Respondent, the natural parent of that child, thus continuing to deprive the Respondent of her constitutionally-protected liberty interest in the care, custody and control of her child so they can continue to pursue custody of a child to which they have no legally cognizable interest. *See Troxel v. Granville, supra,* 530 U.S. at 65; *Santosky v. Kramer, supra; B.B. v. People, supra; People ex. rel. M.B., supra.*

Petitioners obtained custody of the child when the Missouri Courts entered an Order granting them temporary legal custody. That order stated that it was effective only until further order of the court. The Missouri Court has since ruled, awarding custody of the child to his mother, Respondent herein. As this Court stated in *L.G. v. People,* 890 P.2d 647 (Colo. 1995), the purpose behind the UCCJEA is to "limit jurisdiction over custody decrees to one state, thereby eliminating the incentive for forum shopping." The Petitioners' actions in filing the Petition for Allocation of Parental Rights days after the Missouri

Court awarded custody of the child to Respondent can only be characterized as forum shopping. If this Court grants Petitioners the relief they request, it is in essence rewarding forum shopping, thus encouraging jurisdictional battles and rewarding Petitioners' attempt to circumvent the UCCJEA and the ICPC, as well as their deliberate breach of their explicit agreement to return the child to Respondent in the event she decides not to relinquish her rights to the child. Because they come to this Court with unclean hands, this Court should refuse to intercede and grant them the relief they request.

CONCLUSION

Petitioner requests that this Court discharge the Order to Show Cause and remand this matter to the district court for the limited purpose of determining if Respondent is entitled to attorney fees and costs pursuant to C.R.S. §14-13-312 and if so the amount to which she is entitled.

Respectfully submitted this 30th day of January, 2004

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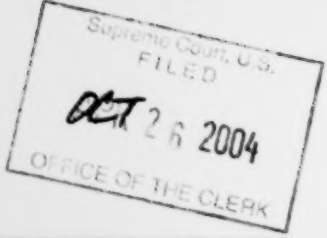

(5)

No. 04-184

IN THE

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C.M.C.,

PETITIONER,

versus

G.A.L. and K.L.,

RESPONDENTS.

On Petition for Writ of Certiorari
to the Colorado Supreme Court

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

Respondents reframed the issues and presented new ones that require a response.

1. The federal question is properly before this Court.

In the state court Petitioner argued that the Colorado Courts must give full faith and credit to the Missouri Court Order. *See Respondent's Appendix* p. 2. 28 USC §1738 A (PKPA) was passed to ensure that states would give full faith and credit to custody decrees of other states. See Testimony of Acting Deputy Attorney General Michel, 96 Cong. Sess. 48 (1980.) The PKPA ensures that parties involved in interstate custody disputes are protected by the full faith and credit clause of the United States Constitution (Art IV sec. I).

The issue was fully before the Colorado Supreme Court, which, over the dissent of Justice Coats, specifically held that the PKPA does not require Colorado to give full faith and credit to the

Missouri custody decree. Respondents' reliance on Rotary Board of Directors of Rotary Intern. v. Rotary Club of Duarte, 481 U.S. 537 (1987) is misplaced. In that case, the state court did not address the federal question. Here, the Colorado Supreme Court ruled on the applicability of the PKPA, and wrongfully decided that Colorado need not follow federal law. *Cf.* Michigan v. Long, 463 U.S. 1032, (1983); Coleman v. Thompson 111 S.Ct. 2546 (1991); Durfee v. Duke 84 S.Ct. 242 (1963).

The Colorado Supreme Court decided an issue of federal law, and Petitioner challenges Colorado's interpretation of federal law. The issue was presented to the Colorado Supreme Court and the Court ruled on the issue. Jurisdictional requirements are therefore satisfied.

2. **The PKPA is applicable to this case.**

Respondents contend that the Missouri order returning physical custody of the child to his mother is not a "custody determination" because it occurred in the context of a failed adoption proceeding. Respondents rely upon Colorado State

law – the UCCJEA – but the Colorado Supreme Court held that the Missouri Court had continuing jurisdiction precisely because its order is a custody determination. People ex rel. A.J.C., 88 P.3d 599, 612 (Colo. 2004).

Moreover, Respondents' reliance upon a provision in the UCCJEA (i.e. Colorado state law) in determining if the Missouri order is a custody decree is misplaced. The question is not whether the Missouri court order constitutes a custody decree under Colorado state law, rather the question is whether the Missouri order is a custody determination under the PKPA. The PKPA defines a custody determination as "a judgment, decree, or other order of a court providing for the custody of a child, and includes permanent and temporary orders, and initial orders and modifications." 28 USC § 1738A(b)(3). The order entered by the Missouri Court meets this criteria. The fact that under Colorado law a custody order made in a failed adoption proceeding **might** be exempted from the provisions of the UCCJEA has no bearing on the applicability of the PKPA.

Thompson v. Thompson, 484 U.S. 174 (1988) does not mandate a different result. The language in Thompson quoted by Respondent refers to the UCCJA which, unlike the UCCJEA, does not have a provision excluding adoption proceedings. The issue of jurisdiction cannot be decided by application of substantive Colorado law.

3. a) Missouri did not decline to exercise jurisdiction.

Respondents argue that because the Missouri Court stated that the adoption proceeding was not a "proper forum to determine custody between **mother and father,"** the Missouri Court did not determine custody of the child as between Petitioner and Respondents. This is untrue. While the Missouri Court ruled that a failed adoption proceeding was not the proper forum to determine custody between mother and father, the Court did not rule that it could not determine custody between the Petitioner (mother of the child) and an unrelated third party (Respondents). To the contrary, the court determined custody and ordered that the child be returned immediately to

his mother. A custody order was entered and that order is enforceable.

The Colorado Supreme Court refused to apply the PKPA not because a custody determination had not been made, but because the Court believed that Missouri declined to exercise jurisdiction by not applying the "best interest of the child" analysis. Under Colorado law, while there is a presumption that it is in the child's best interest to be raised by his or her parents, that presumption is easily rebuttable. The third party need only come forward with evidence regarding the child's "best interest." At least thirty-eight states including Missouri do not apply a "best interest analysis" in custody disputes between parents and non-parents[1] The tests in these states differ as well. Missouri requires a showing of unfitness, abandonment, or "extraordinary

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1.
Alabama, Alaska, Arizona, Arkansas, California, Florida, Georgia, Idaho, Illinois, Kansas, Kentucky, Louisiana, Maryland, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Vermont, Washington, West Virginia, Wisconsin.

circumstances." Cotton v. Wise, 977 S.W.2d 263, 264 (Mo.1998). Presumably, the thirty-seven other states listed in footnote one would find that Missouri did not decline to exercise jurisdiction under the PKPA, while those states that do apply a "best interest" analysis might find that Missouri did decline to exercise jurisdiction. If Respondents' interpretation prevails, federal law would be interpreted differently from state to state depending upon each state's unique statutory definition and legal custody criteria. This would defeat the entire purpose of the PKPA and restores the "seize-and -run" chaos that pre-dated the PKPA. This Court should grant Certiorari and resolve this issue to ensure that federal law is interpreted and applied consistently in all states.

3. b) The Missouri action was pending at the time of the Colorado action.

The Missouri case was pending when Respondents filed their action in Colorado. Three days after filing for custody in Colorado, Respondents filed in Missouri a Motion to Vacate the Judgment dismissing their request to adopt the child and awarding custody to Petitioner. One day prior to Colorado dismissing their petition for custody, the Missouri Court denied the Motion to Vacate. After the denial of their Motion, Respondents continued to litigate the Missouri case by filing an appeal. Therefore, the case was pending as that term is used in the PKPA. By denying the Respondents the right to adopt the child, the Missouri Court did not divest itself of the authority to enter an order removing physical custody of the child from Respondents and granting physical custody of the child to Petitioner. A custody determination was entered by the Missouri Court and pursuant to the PKPA was enforceable in every state including Colorado.

4. Respondents do not have a due process claim

Respondents' due process argument is unavailing because they do not have a constitutionally-protected liberty interest. Rodriguez v. McLoughlin, 214 F.3d 328 (2nd Cir. 2000)(prior to finalization of adoption no liberty interest exists); Procopio v. Johnson, 994 F.2d 325 (7th Cir. 1993) (no liberty interest); Renfro v. Cuyahoga County Department of Human Services, 884 F.2d 943 (6th Cir. 1989); Kyees v. County Department of Public Welfare of Tippecanoe County, 600 F.2d 693 (7th Cir.1979); Drummond v. Fulton County Depart. of Family & Children's Services, 563 F.2d 1200 (5th Cir.1977); Johnson v. Burnett, 182 Ill.App.3d 574, 538 N.E.2d 892 (1989); In Interests of A.C., 415 N.W.2d 609 (Iowa 1987); *In* re Adoption/Guardianship No. 2633, 101 Md.App. 274, 646 A.2d 1036 (1994); Adoption of a Minor, 386 Mass. 741, 438 N.E.2d 38 (1982); In re Dependency of J.H., 117 Wash.2d 460, 815 P.2d 1380 (1991); Engstrom v. Iowa, 461 N.W.2d 309,

319 (Iowa 1990) (Preadoptive parents did not have protected liberty interest in prefamilial relationship with child); People ex rel. A.W.R., 17 P.3d 192 (Colo.App.2000)(the question is whether the foster parents have a realistic expectation of the continuation of the foster-parent foster-child relationship.)

Respondents signed documents acknowledging that the placement of the child with them was "legally at risk" and that if Petitioner's parental rights were not terminated, they would relinquish the child. In the document transferring temporary custody to Respondents, Petitioner reserved the right to change her mind and request the return of her child prior to the court's acceptance of her consent to terminate her parental rights. Until such time as Petitioner's parental rights were terminated, Respondents had no realistic expectation of the continuation of that relationship. Absent a realistic expectation of continued physical custody of the child, there is not a constitutionally-protected liberty interest.

The due process clause is therefore not implicated.

CONCLUSION

Petitioner respectfully requests that this Court issue a Writ of Certiorari to the Colorado Supreme Court and vacate its Order and Judgment, and stay implementation of the Order and Judgment during the pendency of this petition for a Writ of Certiorari.

Respectfully submitted,

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